Supreme Court, U.S.
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In The

Supreme Court of the United States

CHARLES MADU MOMAH,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether excusing a full day of courtroom closure during voir dire because the defendant failed to prove prejudice conflicts with decisions of this Court, the Circuit Courts, and state Supreme Courts, holding that courtroom closure is structural error.

2. Whether a defendant's failure to object to courtroom closure waives the error, where the state has no applicable contemporaneous objection rule and the trial court has the constitutional duty to raise the propriety of closure *sua sponte*.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Dr. Charles Momah petitions for a writ of certiorari to review the judgment of the Washington Supreme Court in *State v. Momah*, 167 Wash.2d 140, 217 P.3d 321 (2009). App. 1-32.

OPINIONS BELOW

The Judgment & Sentence in this criminal case was entered on February 7, 2006; it is attached as App. 69-82.

The Court of Appeals affirmed on direct appeal. *State v. Momah*, 141 Wash. App. 705, 171 P.3d 1064 (2007). App. 34-68. The state Supreme Court granted review, *State v. Momah*, 163 Wash.2d 1012, 180 P.3d 1291 (2008) (App. 33), and affirmed. *State v. Momah*, 167 Wash.2d 140, 217 P.3d 321 (App. 1-32). A timely motion for reconsideration was denied. App. 83.

JURISDICTION

The Washington Supreme Court issued its opinion on October 8, 2009. App. 1-32. A timely motion for reconsideration was denied on March 10, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. VI, which guarantees the right to an open courtroom to criminal defendants, states: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, provides:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. HEATHER PHILLIPS ALLEGES RAPE ON AUGUST 12, 2003

On August 12, 2003, Heather Phillips – a patient of gynecologist Dr. Momah – claimed that she needed

emergency morning-after contraception. She called Dr. Momah three times and asked him to stay late and meet her, after hours, at his office. He agreed.

There was disputed evidence about whether they had had a prior sexual relationship and about whether Dr. Momah would naturally consider her telephone call for an after-hours meeting as a likely invitation for a sexual liaison. But there was no dispute that Phillips and Momah met at his closed office, after hours, at her request; that he examined her; and that he gave her medication she requested for not just contraception, but also Percocet and Valium.

There was also no dispute that Dr. Momah had sex with her on the examining room table. Dr. Momah said it was consensual. Ms. Phillips said it was not.

II. THE PUBLICITY SPOTLIGHTS A PLAINTIFF'S LAWYER, WHO ATTRACTS NUMEROUS PATIENT-CLIENTS

The police investigated Ms. Phillips' allegations and she also contacted an attorney of her own. In addition, she went on television with her face shadowed and voice altered and publicized the allegations.

A plaintiff's lawyer quickly became the center of publicity for all allegations against Dr. Momah. As a result, that lawyer found scores of former patients to file civil lawsuits against Dr. Momah seeking money

damages. The publicity resulted in an extremely high profile case with continuous media coverage.

III. THE STATE FILES CHARGES

The state charged Dr. Momah with sexually assaulting four patients. Counts 2-4 alleged two counts of indecent liberties and one count of second-degree rape, each based on the allegation that Dr. Momah touched private parts of the patient during a medical examination. Count 1, however, charged Dr. Momah with a crime of a different nature, that is, sexual intercourse with Ms. Phillips, without consent.[1]

Dr. Momah denied Counts 2-4 completely. Regarding Count 1, however, he testified that the sex was part of a consensual sexual relationship.

IV. THE TRIAL COURT CLOSED THE COURTROOM FOR A FULL DAY OF VOIR DIRE WITHOUT COMPLYING WITH THE *PRESS-ENTERPRISE I*[2] PREREQUISITES

Numerous potential jurors were questioned because of the publicity surrounding this case. One full day of voir dire occurred behind closed doors, in

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[1] Three additional counts alleged violations of the Health Care False Claims Act, but they were severed before trial.

[2] *Press-Enterprise Co. v. Superior Court of California (Press-Enterprise I)*, 464 U.S. 501 (1984).

chambers or in a closed juror deliberation room, with the court reporter scrupulously noting that the door was "closed" and that each juror questioned was individually escorted in and out of that door.

The October 10, 2005, transcript shows that the judge began instructing jurors in King County Superior Court's very large Presiding Courtroom, E-942, at the beginning of that day. 10/10/05 TR:18. He gave them a questionnaire to fill out, and then court reconvened in W-813, a regular-sized courtroom. *Id.* The parties argued pretrial motions and then broke for lunch. *Id.*, TR:50.

After lunch, they reconvened in W-813. *Id.*, TR:50, 64. They went through lists of jurors to determine who should be questioned individually for a variety of reasons, to discuss hardship requests, etc. *Id.*, TR:51.

At one point on that afternoon of October 10, 2005, they did bring in some jurors to question. The court reporter duly noted, "Prospective jury entered the courtroom." 10/10/05 TR:77. So the questioning about hardship that afternoon occurred in the courtroom itself, of W-813.

It ended with the court reporter noting that the last juror questioned left the courtroom. *Id.*, TR:150. They talked about which jurors had already been excused, which ones needed additional questioning, and then adjourned for the day. *Id.*, TR:156. There was no discussion of courtroom closure.

Court reconvened on October 11, 2005. They began by discussing where they were with excused jurors, remaining jurors, and jurors that needed to be questioned further. 10/11/05 TR:2.

They reconvened in E-942, the large Presiding Judge's courtroom, but noted that they could use that courtroom only in the morning. 10/11/05 TR:2. The parties and the court discussed logistical options for the afternoon, and reasons that jurors had given for "private questioning." 10/11/05 TR:3. The judge suggested using E-942 in the morning, and W-813, the regular-sized courtroom, in the afternoon, as follows:

> What I was thinking is we merge these lists [of jurors requiring individual questioning for different reasons] and do all the jurors who want *individual* questioning, have them come up here, sit up here, perhaps excuse the other jurors until 1:30. I'm not sure. If we think it takes less than a morning then we have to figure out if we can fit everybody in West 813 this afternoon.

Id., TR:4 (emphasis added). This discussion touched on "individual" questioning; the judge had not suggested that voir dire might be closed.

The jurors then entered the courtroom – the court reporter says so on the record. *Id.*, TR:9. The court explained to them that the rest of the process would be different, because some jurors asked for "private" questioning. The judge explained that to

accommodate such requests, "we are going to question you one at a time. . . ." 10/11/05 TR:16.

The judge then told some of the jurors to leave, and kept the ones that he would question individually. He seated them in the jury box and said, "These are our jurors who we are going to individually question this morning." He excused the others. *Id.*, TR:18-19.

Then the record shows – for the first time – that the judge said he would take the jurors to be questioned individually that morning into "the back room" for questioning: "We will take juror 36 first. Let's go in the back room. Those of you out here, we are going to ask for your patience. We will try to go through this as quickly as we can." *Id.*, TR:18-19.

That juror said, "I never requested to be questioned individually." 10/11/05 TR:19. The judge explained that many people had requested individual questioning, and for some others, he decided it would be better to do the questioning individually. *Id.*

The transcript states where they were: "At this time the Court and counsel adjourned to chambers." 10/11/05 TR:19. And, immediately thereafter, "At this time Juror Number 36 entered the courtroom." *Id.* The judge then stated, on the record, that they were in chambers with the door closed: "*We have moved into chambers here. The door is closed.* We have the court reporter present, as well as all counsel and the defendant, along with the Court and juror number 36. Good morning, sir." *Id.*, TR:19-20 (emphasis added).

They then questioned Juror Number 36. When the questioning was done, the judge directed that juror to go back out. The court reporter noted, "At this time Juror Number 36 left chambers." *Id.*, TR:22.

The next juror came into chambers – the court reporter wrote, "At this time Juror Number 2 entered chambers." *Id.* She was questioned about prior knowledge of the case. When that questioning was done, the court reporter wrote: "At this time Juror Number 2 left chambers." *Id.*, TR:26. Then, "At this time Juror Number 3 entered the chambers." *Id.*, TR:28.

The court reporter even noted when the bailiff came in. In the middle of this juror's questioning, the court reporter noted, in the middle of a question posed by defense counsel, "At this time the bailiff entered chambers." *Id.*, TR:30. The judge told the bailiff, "We are going to use you to bring the jurors in. So when we excuse Ms. Nuss we will have you bring the next one." 10/11/05 TR:30.

After Juror Number 3 was excused, the court reporter noted, "At this time Juror Number 7 entered chambers." *Id.*, TR:32. Juror Number 7 was excused, the parties discussed him briefly, and then the court reporter wrote, "At this time Juror Number 6 entered chambers." *Id.*, TR:35. She was excused; the court reporter wrote, "At this time Juror Number 6 left chambers"; she was discussed by the parties and the judge; and then, "At this time Juror Number 11 entered chambers." *Id.* The court reporter noted when

that juror left, *id.*, TR:48, and when the next one, Juror Number 14, came into chambers. *Id.*, TR:49. This scrupulous notation of who entered and who left continued for the rest of the morning.[3] During all this time that the court reporter recorded who the bailiff escorted in and out of the "closed" door of E-942's chambers, the judge never asked the parties' views on closure, made any findings regarding closure, or considered less restrictive alternatives than closure, and the court reporter never noted any other person entering.

Before they broke for lunch, though, the court stated, "We will reconvene at 2:00 in West 813 [the regular-sized courtroom]." *Id.*, TR:104.

They did reconvene there after lunch, but not in the courtroom part of W-813 – in the jury room, instead: "I guess we have twenty folks outside in the hall. What I propose to do is have them come into the courtroom, we will move to the jury room for the individual questioning, and question them one at a time. I thought about having them in the jury room, but there is only 16 chairs." *Id.*, TR:105. The judge made no inquiry or findings concerning this courtroom closure.

The jury then entered the courtroom after some housekeeping discussions; the court reporter wrote,

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[3] The court reporter made the same sort of notes for Juror Numbers 14, 19, 22, 30, 31, 34, and 35 that morning.

"At this time the prospective jury entered the courtroom." *Id.*, TR:106. The judge welcomed them and explained that they would sit in the courtroom, while the parties and the judge called them one at a time into the separate jury room:

> Welcome back, ladies and gentlemen. We are continuing in the individual questioning process. We would like you to have a seat here in the courtroom while we take one juror at a time. The attorneys and I and the court reporter will recess back in the jury room. You can just rest at ease until we have you come back for questioning. We will give you further instructions at the end of each individual questioning period. *With that, we are going to adjourn back into the jury room, the lawyers, the defendant and the court reporter.*

10/11/05 TR:106 (emphasis added). "At this time the Court and counsel moved to the jury room." *Id.*

Next, an individual juror came in to that jury room: "At this time Juror Number 100 entered the jury room." *Id.*, TR:107. The court reporter wrote down when she left. *Id.*, TR:108. The court reporter wrote down when the next juror, Number 39, "entered the jury room." *Id.* The court reporter wrote down when he left. *Id.*, TR:118. The court reporter wrote down when the next juror came into that jury room: "At this time Juror Number 41 entered the jury room." *Id.*, TR:119. The court reporter wrote down when he left. *Id.*, TR:130 ("At this time Juror Number

40 left the jury room."). The court reporter noted when the next juror came in. *Id.*, TR:131 ("At this time Juror Number 41 entered the jury room."). The court reporter noted when he left. *Id.*, TR:141.

The parties then discussed whether to go on, and the prosecutor noted the time – 3:10 p.m. 10/11/05 TR:141. The judge adjourned court for the day. *Id.*, TR:142.

Following trial, Dr. Momah was convicted as charged.

V. THE STATE COURT DECISIONS

The intermediate appellate court agreed that closing voir dire without satisfying the constitutional prerequisites to closure violates the right to a public trial.[4] The appellate court refused to reverse because it ruled that in-chambers questioning was not "closed" in the constitutional sense, and that the trial

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[4] *See Press-Enterprise Co. v. Superior Court of California (Press-Enterprise II)*, 478 U.S. 1, 13-14 (1986) ("proceedings cannot be closed unless specific, on the record findings are made" which show closure essential and narrowly tailored); *Waller v. Georgia*, 467 U.S. 39, 45, 48 (1984) (findings must be sufficient to support closure, may not be "broad and general"); *Press-Enterprise I*, 464 U.S. 501, 510 (findings must be sufficiently specific for appellate review); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) ("Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public").

judge's subjective intent was not to keep matters secret from the press or public. App. 47-48.

The Washington Supreme Court rejected the appellate court's characterization of the courtroom as open. Instead, that court ruled that courtroom closure did not constitute structural error. *Momah*, 167 Wash.2d at 156; App. 17. The concurrence agreed, stating: "no harm, no foul." *Momah*, 167 Wash.2d at 156; App. 18. The majority asserted that there was no prejudice here because closure "occurred to protect Momah's rights and did not actually prejudice him. The record reveals that due to the publicity of Momah's case, the defense and the trial court had legitimate concerns about biased jurors or those with prior knowledge of Momah's case." *Id.*, 167 Wash.2d at 156; App. 17.

That court also ruled that Dr. Momah invited the closure by his silence, even though neither he nor his lawyer were asked about closure and neither one said anything about closure. The Washington Supreme Court came to this conclusion because defense counsel was concerned about publicity and requested "individual" voir dire so as not to taint other jurors; the Court ruled that the request for *individual* questioning invited closure. *Momah*, 167 Wash.2d at 155; App. 16.[5]

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[5] The state Supreme Court said that Dr. Momah made an affirmative request for courtroom closure to avoid jury contamination

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due to the publicity surrounding this high profile, cross racial, cross-cultural, sexual assault case: "Momah affirmatively assented to the closure, [and] argued for its expansion." *Momah*, 167 Wash.2d 140, 151; App. 11. "[D]efense counsel made a deliberate choice to pursue in-chambers voir dire to avoid 'contamination' of the jury pool by jurors with prior knowledge of Momah's case." *Id.*, 167 Wash.2d at 155; App. 16.

The record, however, shows that Dr. Momah's lawyer actually asked for "individual" voir dire, not "closed" voir dire. 10/6/05 VRP.68 ("we need to find out what the jury knows about the case . . . and I would suggest we need to do *individual voir dire* so they don't contaminate the rest of the jury") (emphasis added). Neither Dr. Momah nor his lawyer ever asked for voir dire to occur in a closed courtroom. As the Chief Justice stated in dissent:

> I dissent because, in my view, the majority wrongly concludes that Charles Momah "affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it." . . . Except for Momah's tacit participation in the closed-door questioning, there is no support in the record for any of these conclusions. Indeed, the record discloses that Momah did not affirmatively assent to closure, did not argue for the expansion of it, was not asked if he objected to it, and did not benefit from it. The record demonstrates, rather, that the trial court closed jury voir dire on its own initiative and failed to consider any of the constitutional rights we discussed in *State v. Bone Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). . . . Neither did the trial court engage in the closure analysis made mandatory by that decision.

Momah, 167 Wash.2d at 157 (Alexander, C.J., dissenting); App. 18-19.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

It is well settled as a matter of federal constitutional law that it is automatic reversible error for a trial court to close the courtroom during voir dire. *Presley v. Georgia*, ___ U.S. ___, 130 S.Ct. 721 (2010); *Press-Enterprise I*, 464 U.S. 501. It violates the defendant's right to a public trial.[6] Such violations are especially harmful to the administration of justice in high-profile and emotional cases, like this one, in which the defendant's interest in public supervision and the society's interest in the therapeutic effect of trial are at their zenith. *Press-Enterprise I*, 464 U.S. at 509.

The trial court here held a full day of voir dire behind closed doors. The questions are whether silence in the face of courtroom closure constitutes waiver, and whether prejudice must be proven to gain relief.

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[6] *Presley v. Georgia*, 130 S.Ct. 721, 722; *See Press-Enterprise I*, 464 U.S. 501 (right to open courtroom applies to voir dire); *Waller v. Georgia*, 467 U.S. 39 (Sixth Amendment right to public trial in criminal case applies to pretrial suppression hearing). *See also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580.

II. THE STATE SUPREME COURT'S HOLDING THAT COURTROOM CLOSURE CAUSED NO PREJUDICE CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT IT IS STRUCTURAL ERROR, EXEMPT FROM HARMLESS ERROR REVIEW

A. The Washington Supreme Court Ruled That Courtroom Closure Caused No Prejudice

The Washington Supreme Court ruled that the courtroom was closed for a day of voir dire, but that the error was harmless. *Momah*, 167 Wash.2d at 155; App. 17. The concurrence agreed, stating: "no harm, no foul." *Momah*, 167 Wash.2d at 156 (Penoyer, J.P., concurring); App. 18.

B. That Decision Conflicts With This Court's Decisions Holding That Courtroom Closure is Structural Error

This Court, however, has consistently ruled that courtroom closure is structural error requiring reversal without any inquiry into prejudice. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). *See also United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006); *Neder v. United States*, 527 U.S. 1, 8 (1999); *United States v. Johnson*, 520 U.S. 461, 469 (1997).

Even *Waller v. Georgia*, 467 U.S. 39, 48, cited by the Washington Supreme Court majority for the rule that prejudice must be proven, actually adhered to the no-prejudice rule. The *Waller* Court ruled: "the

defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee." *Id.*, 467 U.S. at 49. It simply crafted a remedy specific to the suppression hearing context, that is, reversal of the result of the suppression hearing and remand for a new hearing.

C. That Decision Conflicts With the Circuit and State Courts Holding That Courtroom Closure is Structural Error

Courtroom closure is also structural error requiring reversal, without any inquiry into prejudice, in other jurisdictions, both state and federal. *E.g.*, *Carson v. Fischer*, 421 F.3d 83 (2d Cir. 2005); *Walton v. Briley*, 361 F.3d 431 (7th Cir. 2004); *State v. Padilla*, 46 P.3d 1247, 1253 (N.M. 2002); *Ross v. United States*, 289 F.3d 677, 681-82 (11th Cir. 2002), *cert. denied*, 537 U.S. 1113 (2003) (same); *Judd v. Haley*, 250 F.3d 1308 (11th Cir. 2001); *State v. Cuccio*, 794 A.2d 880 (N.J. App. Div.), *review denied*, 803 A.2d 638 (2002).[7]

The Washington Supreme Court's decision conflicts with those authorities, also.

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[7] *See Guzman v. Scully*, 80 F.3d 772, 776 (2d Cir. 1996) ("[I]t is a well-settled rule that a defendant whose right to a public trial has been violated need not show he suffered any prejudice, and the doctrine of harmless error does not apply"); *Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir. 1994), *cert. denied*, 513 U.S. 1102 (1995) ("the petitioner need not show prejudice.").

D. That Decision Conflicts With the Rationale For Applying "Structural Error" to Claims of This Sort

The reason for the "structural error" rule is not that deprivation of an open courtroom *necessarily* changes the outcome of the trial. Instead, it is the practical impossibility of evaluating prejudice from such errors that places them into the category of structural error. *Fulminante,* 499 U.S. 297, 310.

The state court, however, ruled that Dr. Momah failed to prove prejudice because closing the courtroom for voir dire actually protected him, given the publicity surrounding his case.

But this Court has emphasized the value of the open courtroom in the context of the most "shocking" and high profile cases: "When a shocking crime occurs, a community reaction of outrage and public protest often follows. . . . Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion." *Richmond Newspapers*, 448 U.S. 555, 571.

This was just such a high profile case. Media coverage was extensive. The parties and the court acknowledged this on the record. The media coverage confirms it.[8] And the subject was indeed "shocking."

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[8] *E.g.*, KOMO TV Five News, "Employees and Patients Sue Doctor Accused of Rape," 9/14/03, available at http://www.komotv.com/news/story.asp?id=27180; King Five News, "More

(Continued on following page)

In America, cross-racial conflicts between black and white predictably produce volatile responses.[9] But few incidents are more volatile than the criminal trial of a black man for a serious sexual crime against a white woman.[10] In this case, there were several white

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Misconduct Charges Surface Against Federal Way Ob-Gyn," 9/15/03, available at http://www.king5.com/topstories/NW_091503WABmomahlawsuit.2ff8a70.html; Noel S. Brady, KING COUNTY JOURNAL, "Gynecologist Faces Civil Suit," 9/16/03; NBC News, *The Today Show*, "Jolie Campbell, Alleged Victim, and Attorney Harish Bharti Discuss Jolie's Alleged Rape by Dr. Charles Momah," 9/26/03; Noel S. Brady, KING COUNTY JOURNAL, "Momah Lawsuits Mount," 9/27/03; Angie Leventis, THE NEWS TRIBUNE, "State Suspends Doctor Suspected of Rape," 9/27/03; Associated Press, "Suspended Doctor Was Accused Three Ago," 9/28/03; NBC News, *The Abrams Report*, 9/29/03; CBS News, *The Early Show*, "Raped by One's Obstetrician?", 9/30/03; King Five News, "More Accusations, But No Arrest for Ob-Gyn," 10/9/03, available at http://www.king5.com/topstories/NW_100803HEKmomahKC.2de92ff.html; Noel S. Brady, KING COUNTY JOURNAL, "Doctor Faces 46 Lawsuits," 10/19/03; King Five News, "Suspended Doctor Faces a Dozen New Accusations," 1/23/04, available at http://www.king5.com/health/stories/NW_012304WABmomahKC.46d20fd9.html; Julia Summerfeld, THE SEATTLE TIMES, "Gynecologist Facing 6 New Sex Counts," 1/23/04; Noel S. Brady, KING COUNTY JOURNAL, "Doctor Accused of Witness Tampering," 1/23/04; and Associated Press, "Suspended Doctor Faces a Dozen New Accusations," 1/24/04.

[9] *See United States v. Koon*, 34 F.3d 1416, 1425 (9th Cir. 1994), *aff'd in part, rev'd in part, Koon v. United States*, 518 U.S. 81, 116 (1996) (detailing the facts of the Rodney King beating); Tom Wolfe, *A Bonfire of the Vanities*, New York: Farrar, Straus and Giroux (1987).

[10] *See generally*, *Press-Enterprise I*, 464 U.S. 501, 521-22 (Marshall, J., concurring) (because this was a cross-racial sexual assault and murder case, the extremely long voir dire was understandable; "Given the history and continuing legacy of

(Continued on following page)

women who alleged just such sexual crimes by Dr. Momah, an African-American man from Nigeria.[11]

Under this Court's precedent, the justification for an open courtroom was at its height here, given this coverage, not at its nadir, as the state Supreme Court opined.

II. THE STATE SUPREME COURT'S HOLDING THAT FAILURE TO OBJECT WAIVES THE ERROR – DESPITE THE LACK OF A CONTEMPORANEOUS OBJECTION RULE – CONFLICTS WITH DECISIONS HOLDING THAT THE TRIAL COURT HAS A DUTY TO RAISE THIS ISSUE *SUA SPONTE*

A. The State Supreme Court Held That Silence of Defendant and Defense Counsel on Courtroom Closure Invited the Error

The state Supreme Court held that the defendant's request for individual voir dire and his

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racism in our country, that fact alone should suggest that a greater than usual amount of inquiry may have been needed in order to obtain a fair and impartial jury in this case."); Harper Lee, *To Kill A Mockingbird*, Philadelphia, PA: J. B. Lippincott, 1960; Eldridge Cleaver, *Soul on Ice*, New York: McGraw-Hill Book Company, 1968. See also the notorious Scottsboro Boys trial and appeal, *Powell v. Alabama*, 287 U.S. 45, 69-71 (1932), holding that due process clause requires appointment of counsel to indigent criminal defendant in capital case.

[11] 11/2/05 VRP:99 (re: Nigerian background).

participation in questioning invited courtroom closure. *Momah*, 167 Wash.2d at 151-52, 154; App. 11, 15. This was not a contemporaneous objection bar; the Court explained that under Washington law, a courtroom closure claim can be raised for the first time on appeal. *Id.*, 167 Wash.2d at 155; App. 15. Instead, it was a new doctrine the Court made up and called akin to waiver, *id.*, 167 Wash.2d at 154; App. 15; it meant that the trial court chose closure to help get an impartial jury, so the defendant really benefitted.

B. This Holding Conflicts With This Court's Decisions Holding That the Trial Court Must Raise This Issue *Sua Sponte*

Certainly, a defendant can waive the right to a public trial. *Singer v. United States*, 380 U.S. 24, 35 (1965). This Court's decision holding that silence can waive this right, however, pre-dates *Waller*. *Levine v. United States*, 362 U.S. 610, 618-19 (1960).[12] In *Waller*, in contrast, this Court granted relief to not just the defendant who contemporaneously objected, but even to the defendant who did not. *Waller*, 467 U.S. at 42, n.2. The Washington Supreme Court's ruling conflicts with that holding of *Waller*.

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[12] *Cf. Freytag v. Comm'r*, 501 U.S. 868, 896 (1991) (Scalia, J., concurring) (noting that litigant has a duty to raise right to open courtroom at risk of waiving it). *See also Peretz v. United States*, 501 U.S. 923, 936 (1991) (citing *Levine*).

It also conflicts with the rationale for that holding. Under this Court's precedents, it is the trial court that has the duty to raise the courtroom closure issue, and to consider any alternatives to closure, or to fashion less restrictive alternatives, *sua sponte*. *Presley v. Georgia*, 130 S.Ct. 721, 724-25. Further, it is the party seeking closure who has the duty to prove that it satisfies all the prerequisites to closure – it is not the defendant's duty to disprove that. *Presley v. Georgia*, 130 S.Ct. at 724.

Requiring the defendant to raise this issue and his objections thus conflicts with the line of cases holding that the trial court is the party with the duty to raise this issue and hence to elicit any objections. *Id.*; *Press-Enterprise Co. v. Superior Court of California (Press-Enterprise II)*, 478 U.S. 1, 13-14 (1986); *Richmond Newspapers*, 448 U.S. 555, 580-81; *Press-Enterprise I*, 464 U.S. 501, 510.

C. This Holding Conflicts With Decisions of the Sixth, Seventh and Eighth Circuits and At Least One State Supreme Court Holding that the Right to an Open Courtroom is Not Waived by Silence

The federal Courts of Appeals and state courts are in conflict on this point. The First and Fifth Circuits and at least one state Supreme Court are in accord with the Washington Supreme Court in holding that the right to an open courtroom can be waived by silence. *United States v. Hitt*, 473 F.3d 146,

155 (5th Cir. 2006), *cert. denied*, 549 U.S. 1360 (2007); *Martineau v. Perrin*, 601 F.2d 1196, 1200 (1st Cir. 1979) (coming to this conclusion, even applying the knowing, intelligent and voluntary waiver standard);[13] *State v. Butterfield*, 784 P.2d 153, 157 (Utah 1989). *See also People v. Gratton*, 309 N.W.2d 609, 610-11 (Mich. App. 1981).

On the other hand, the Sixth, Seventh, and Eighth Circuits, and two state high courts, hold that the right to an open courtroom cannot be waived by silence. *Johnson v. Sherry*, 586 F.3d 439, 447 n.8 (courtroom closure may constitute reversible error despite defense counsel's acquiescence; remanded for hearing because raised as ineffective assistance claim on habeas) (6th Cir. 2009), *petition for certiorari filed*, May 18, 2010 (No. 09-1342); *Crawford v. Minnesota*, 498 F.3d 851, 855 (8th Cir. 2007) ("A defendant's passive failure to object to closing the courtroom while the victim of a sex offense testifies does not waive compliance with the requirements of a detailed inquiry into the need for closure and of appropriate findings. But if the defendant acting through his attorney agrees to closure . . . , the issue is procedurally defaulted on appeal."); *Walton v. Briley*, 361 F.3d 431, 434 (7th Cir. 2004) (right to public trial "may be relinquished only upon a showing that the

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[13] In a more recent decision, however, that court held that courtroom closure issues can be reviewed for "plain error," which suggests they can be reviewed despite no objection in the court below. *United States v. Scott*, 564 F.3d 34 (1st Cir. 2009).

defendant knowingly and voluntarily waived such a right"; silence does not meet that standard); *State v. Tapson*, 41 P.3d 305, 310 (Mont. 2001) ("While Tapson's counsel professed to waive these rights, there is nothing in the record to indicate that Tapson himself was apprised of these rights, nor is there anything in the record indicating that he personally made a knowing, intelligent and voluntary waiver of these rights."); *State v. Hensley*, 79 N.E. 462, 464 (Ohio 1906) ("The right to a public trial is guaranteed. It is of the same high order of right as . . . that to appear and defend in person and with counsel; that to meet the witnesses face to face and have compulsory process, and that to a trial by jury. The right cannot be waived by silence any more than can the right to be tried by jury where the accusation is a felony and the plea is not guilty.").[14] Other circuits hold that structural errors in general are subject to review for plain error and, hence, it should follow that the right to an open courtroom can be challenged on appeal despite silence in the court below. *United States v. Jimenez Recio*, 371 F.3d 1093, 1101 (9th Cir. 2004) (structural errors satisfy the third prong of the "plain error" test); *United States v. Vasquez*, 271 F.3d 93, 100 (3d Cir. 2001), *cert. denied*, 536 U.S. 963

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[14] *Accord State v. Bethel*, 110 Ohio St.3d 416, 854 N.E.2d 150 (2006) (same holding and referring to state constitutional right to open court). *But see State v. Drummond*, 854 N.E.2d 1038, 1055 (Ohio 2006) (right to public courtroom waived by silence; no discussion of *Hensley*).

(2002); *United States v. David*, 83 F.3d 638, 646-47 (4th Cir. 1996).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 7th day of June, 2010.

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167 Wn.2d 140; 217 P.3d 321; 2009 Wash. LEXIS 967

THE STATE OF WASHINGTON, *Respondent*,
v.
CHARLES MOMAH, *Petitioner*.

June 10, 2008, Argued
October 8, 2009, Filed

COUNSEL: Sheryl Gordon McCloud (of *Law Offices of Sheryl Gordon McCloud*) and Jeffrey L. Fisher (of *Davis Wright Tremaine LLP*), for appellant.

Daniel T. Satterberg, *Prosecuting Attorney*, and James M. Whisman, *Deputy*, for respondent.

JUDGES: AUTHOR: Justice Charles W. Johnson. WE CONCUR: Justice Barbara A. Madsen, Justice Susan Owens, Justice Mary E. Fairhurst, Justice James M. Johnson, Joel M. Penoyar, Justice Pro Tem. AUTHOR: Joel M. Penoyar, Justice pro Tem., concurring. AUTHOR: Chief Justice Gerry L. Alexander, dissenting. WE CONCUR: Justice Richard B. Sanders, Justice Tom Chambers.

OPINION BY: Charles W. Johnson Justice

OPINION

En Banc

¶ 1 C. JOHNSON, J. – The Washington Constitution provides in relevant part that an accused has the right to "a speedy *public trial* by an *impartial jury*." CONST. art. I, § 22 (emphasis added). This case asks us to determine whether a defendant's constitutional right to a public trial under article I, section 22 was

violated when the trial court closed a portion of voir dire to safeguard the defendant's right to a trial by an impartial jury. While our previous article I, section 22 cases have focused on the defendant's right to a public trial, this case implicates both the right to a public trial and the right to an impartial jury. Here, we find the trial court, in consultation with the defense and the prosecution, carefully considered the defendant's article I, section 22 rights, closed the courtroom to preserve his right to an impartial jury, and narrowly tailored the closure to secure that right. We hold the closure in this case was not a structural error and affirm Charles Momah's conviction.

FACTS

¶ 2 In 2005, Charles Momah, a gynecologist, was charged in King County Superior Court with one count of rape in the third degree, two counts of indecent liberties, and one count of rape in the second degree. These charges arose out of allegations that Momah had sexually violated his patients as he performed physical examinations. The case was scheduled for a jury trial.

¶ 3 Momah's case was heavily publicized, having received extensive media coverage. Due to the significant amount of publicity, a large number of prospective jurors, over 100, were summoned. Tr. of Proceedings on Appeal (TPA) (Oct. 10, 2005) at 3. Based on the jurors' responses to portions of the juror questionnaire, the judge, prosecutor, and defense

counsel discussed a list of jurors to be individually questioned. TPA (Oct. 11, 2005) at 5-8, 17-20. Momah's counsel agreed to the private questioning of potential jurors and also argued for the expansion of in-chambers questioning. Defense counsel proposed:

> Your Honor, it is our position and our hope that the Court will take everybody individually, besides those ones we have identified that have prior knowledge. Our concern is this: They may have prior knowledge to the extent that that might disqualify themselves, or we have the real concern that they will contaminate the rest of the jury.

TPA (Oct. 11, 2005) at 4. The prosecutor agreed to the proposal to expand the individual questioning. TPA (Oct. 11, 2005) at 4.

¶ 4 A list of jurors to be individually questioned was then selected, and defense counsel agreed with this list. TPA (Oct. 11, 2005) at 5-6. The group of jurors questioned in-chambers included three general categories: (1) people who indicated prior knowledge about the case, (2) people who asked for private questioning, or (3) people who said they could not be fair. TPA (Oct. 11, 2005) at 27.

¶ 5 Before moving into chambers for private questioning, the judge acted to prevent jurors with knowledge of the case from potentially tainting the rest of venire by explaining the importance of an impartial jury to a fair trial. The trial judge stated:

> It is important for the fairness of the process to both sides that no juror and no individual research any aspect of this case. . . . The case has to be decided on the evidence presented in court. . . . Secondly, it is important that you not talk amongst yourselves about the case. . . . [Y]ou just cannot talk about the case, your views, impressions, because at this point you have not heard any evidence. And you may in the end not even be seated on the jury.

TPA (Oct. 11, 2005) at 16-17. After the court moved into chambers, Momah's counsel actively participated in individual juror questioning regarding prior knowledge of Momah's case and the ability to be fair and impartial. TPA (Oct. 11, 2005) at 19-142. The defense counsel and the prosecution individually questioned about 20 jurors during the morning and then 4 more later that afternoon.[1] TPA (Oct. 11, 2005) at 19-104, 107-42. As a result of the in-chambers voir dire, defense counsel exercised numerous challenges for cause. TPA (Oct. 11, 2005) at 38-48, 59-78, 89-104.

¶ 6 At the conclusion of trial, the jury convicted Momah of all charges. The trial court imposed a standard range sentence of 245 months. The Court of Appeals, Division One, affirmed his convictions.

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[1] A review of the record indicates that most of the questions the court and counsel asked jurors concerned their prior knowledge of the case resulting from media publicity.

ISSUE

¶ 7 Whether the trial court violated Momah's constitutional right to a public trial.

ANALYSIS

¶ 8 To determine whether the trial court violated Momah's rights, we first review separately the article I, section 22 rights this case implicates: the right to a speedy public trial and the right to an impartial jury.

A. Public Trial Right

¶ 9 Whether the right to a public trial has been violated is a question of law subject to de novo review. *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995).

¶ 10 Article I, section 10 provides that "[j]ustice in all cases shall be administered openly." The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to a "public trial by an impartial jury." These provisions have a commonality: they protect the right to a *public* proceeding.

¶ 11 Our cases have recognized the importance of open proceedings and have emphasized that article I, section 10 secures the public's free and open access to judicial proceedings. We have also stressed that openness of courts is essential to the court's ability to

maintain public confidence in the fairness and honesty of the judicial branch of government. But these principles do not exist in isolation of other constitutional rights and principles.

¶ 12 Article I, sections 10 and 22 serve complementary and interdependent functions in assuring fairness of our judicial system, particularly in the context of a criminal proceeding. Indeed, the central aim of any criminal proceeding must be to try the accused fairly. Thus, the requirement of a public trial is primarily for the benefit of the accused: that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to a sense of the responsibility and to the importance of their functions. For these reasons, under article I, sections 10 and 22, a strong presumption exists that courts are to be open at all trial stages.

¶ 13 This presumption of openness extends to voir dire because "'[t]he process of juror selection' . . . 'is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'" *In re Pers. Restraint of Orange,* 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting *Press-Enter. Co. v. Superior Court,* 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). While the right to a public trial applies to all judicial proceedings, including jury selection, the right is not absolute. The presumption in favor of openness may be overcome by an overriding interest based on findings that closure is essential to preserve higher values and narrowly tailored to serve that

interest. Thus, the court may close a courtroom under certain circumstances.

¶ 14 To protect the defendant's public trial right under article I, section 22, this court adopted the same standard for closing the court that applies to cases under article I, section 10. *Bone-Club,* 128 Wn.2d at 259. The decisions employing this closure standard for both sections 10 and 22 cases are similar to the analysis applied under the Sixth Amendment and the United States Supreme Court decision in *Waller v. Georgia,* 467 U.S. 39, 47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). To determine if closure is appropriate, we apply closure guidelines drawn from *Waller*'s approach. *Bone-Club,* 128 Wn.2d at 259-61; *Orange,* 152 Wn.2d at 805-08. These five guidelines are as follows:

> "1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right *other than an accused's right to a fair trial,* the proponent must show a 'serious and imminent threat' to that right.
>
> "2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> "3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

> "4. The court must weigh the competing interests of the proponent of closure and the public.
>
> "5. The order must be no broader in its application or duration than necessary to serve its purpose."

Bone-Club, 128 Wn.2d at 258-59 (emphasis added) (alteration in original) (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)). After applying these guidelines, the court should enter specific findings on the record to justify the closure.

¶ 15 If, on appeal, the court determines that the defendant's right to a fair public trial has been violated, it devises a remedy appropriate to that violation. If the error is structural in nature, it warrants automatic reversal of conviction and remand for a new trial. An error is structural when it "'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (alterations in original) (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). *Waller* itself establishes that not all courtroom closure errors are fundamentally unfair and thus not all are structural errors; our cases applying *Waller* also support that proposition.

¶ 16 In *Waller*, the trial court closed the courtroom for a suppression hearing over the objections of

the defendant, and, on review, the Supreme Court held that the defendant was entitled to a new suppression hearing, but not automatically a new trial. The Court reasoned that "the remedy should be appropriate to the violation," and if it were to automatically grant a new trial without requiring a new hearing, the result would be a "windfall for the defendant" and would thus "not be in the public interest." *Waller,* 467 U.S. at 50. The Court did *not* conclusively presume prejudice and grant automatic reversal of the defendant's conviction and a new trial. Rather, in *Waller,* the Court required a showing that the defendant's case was actually rendered unfair by the closure.

¶ 17 Similarly, in our cases following *Waller,* we have held that the remedy must be appropriate to the violation and have found a new trial required in cases where a closure rendered a trial fundamentally unfair. For instance, in *State v. Easterling,* 157 Wn.2d 167, 137 P.3d 825 (2006), we remanded a case for a new trial where the court closed the courtroom, excluding the defendant from a portion of his own trial, while his codefendant made a motion to sever and struck a deal with the State to testify against him. In that case, the closure affected the fairness of Easterling's trial because the court did not seek or receive input or objection from Easterling, and it prevented him from being present during a portion of his own proceedings.

¶ 18 Likewise, in *Orange,* we ordered a new trial because the trial court excluded the defendant's

family and friends from voir dire, though defense counsel twice requested that they be present. The closure compromised Orange's right to a fair trial by excluding his family and friends from "'contribut[ing] their knowledge or insight to the jury selection and the inability of venirepersons to see the interested individuals.'" *Orange*, 152 Wn.2d at 812 (emphasis omitted) (quoting *Watters v. State*, 328 Md. 38, 48, 612 A.2d 1288 (1992)); *see also Bone-Club*, 128 Wn.2d 254 (without seeking objection or receiving assent from defendant, court excluded defendant from closed pretrial suppression hearing to protect undercover activities of State's witness); *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005) (court ordered sua sponte closure, without seeking objection or receiving assent from defendant and excluded defendant's family and friends from courtroom due to concerns over space and security).

¶ 19 In the aforementioned cases, the closure errors were held to be structural in nature. Prejudice to the defendant in those cases was sufficiently clear and required the remedy of a new trial. In each case, the trial court closed the courtroom based on interests other than the defendant's; the closures impacted the fairness of the defendant's proceedings; the court closed the courtroom without seeking objection, input, or assent from the defendant; and in the majority of cases, the record lacked any hint that the trial court considered the defendant's right to a public trial when it closed the courtroom. *Bone-Club*, 128 Wn.2d at 260 (court held closure a structural error, reasoning in

part that "the record lacks any hint the trial court considered Defendant's public trial right"); *Brightman,* 155 Wn.2d at 518 (same); *Orange,* 152 Wn.2d at 811-12 (same). Accordingly, we reversed the convictions and remanded the cases for a new trial.

¶ 20 Applying these principles to this case, we find the facts distinguishable from our previous closure cases. Here, Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests. Where, as here, a defendant's other constitutional rights are implicated, the trial court is required to give due consideration to those rights in determining whether closure is appropriate.[2]

B. Impartial Jury

¶ 21 Under article I, section 22, the accused is entitled to a "public trial by an *impartial jury*" (emphasis added). The right to a public trial and the

[2] In order to facilitate appellate review, the better practice is to apply the five guidelines and enter specific findings before closing the courtroom.

right to an impartial jury are two interrelated but distinct rights. As described above, article I, section 22's "public trial" right, like article I, section 10's right of the public to open proceedings, focuses on the *public* nature of a defendant's fair trial right. The "impartial jury" aspect of article I, section 22, focuses on the defendant's right to have unbiased jurors, whose prior knowledge of the case or their prejudice does not taint the entire venire and render the defendant's trial unfair. Indeed, an essential element of a fair trial is an impartial trier of fact – a jury capable of deciding the case based on the evidence before it. Thus, voir dire is a significant aspect of trial because it allows parties to secure their article I, section 22 right to a fair and impartial jury through juror questioning.

¶ 22 On the one hand, Momah had a right to have openness where the public and jurors could hear every part of the proceedings, ensuring the fairness of his trial process. On the other, Momah had a right to an impartial jury, wherein no juror's prejudice or prior knowledge would compromise the fairness of Momah's trial process. One right privileges openness, while the other may necessitate closure.

¶ 23 As we have stated in instances where article I, sections 10 and 22 were in conflict: we must harmonize the right to a public trial with the right to an impartial jury. *Federated Publ'ns, Inc. v. Kurtz*, 94 Wn.2d 51, 61, 615 P.2d 440 (1980). In *Kurtz*, a newspaper sought both to gain access to a pretrial suppression hearing and an injunction barring the

trial judge from excluding it from other aspects of a trial in a highly publicized murder case. In that case, this court held the trial judge struck the proper balance between the defendant's right to an impartial jury and the public's right of access by closing the courtroom, and we denied the requested relief. We reasoned in part that given the difficulty of effacing pretrial publicity from jurors' minds, trial courts must take appropriate measures to ensure that the balance is never weighted against the accused.

¶ 24 In the present case, we must also balance the article I, section 22 rights at issue. To achieve the proper balance, we construe those rights in light of the central aim of a criminal proceeding: to try the accused fairly. Further, to ensure that a criminal defendant receives a fundamentally fair trial, we permit the accused to make tactical choices to advance his own interests and ensure what he perceives as the fairest result. In our adversarial system, these are basic rights of the accused. Accordingly, the choices a party makes at trial may impact their ability to seek relief from an alleged error or may affect the remedy they receive.

¶ 25 In some cases, courts have used the invited error doctrine to analyze the impact a party's tactical choices have on alleged error. The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. The doctrine was designed in part to prevent parties from misleading trial courts and receiving a windfall by doing

so. *State v. Henderson,* 114 Wn.2d 867, 868, 792 P.2d 514 (1990). Different factors have led courts to conclude that the alleged error merits denial of relief under this doctrine.

¶ 26 In *City of Seattle v. Patu,* 147 Wn.2d 717, 58 P.3d 273 (2002), we found the invited error doctrine applicable where a defendant proposed a jury instruction based on an ordinance that was later declared unconstitutional. In *Patu,* the defendant proposed an instruction that was missing an essential element of the crime, the court accepted the instruction, and the jury convicted the defendant. On appeal, the defendant sought reversal of conviction based on the trial court's failure to include an essential element of the offense in the instruction. We affirmed the conviction and held the invited error doctrine applied, reasoning that a party may not request an instruction and later complain on appeal that the requested instruction was given. *See also State v. Studd,* 137 Wn.2d 533, 973 P.2d 1049 (1999) (holding invited error doctrine applicable to defendants who proposed erroneous instruction without attempting to add remedial instruction and reasoning, although error was of constitutional magnitude and presumed prejudicial, defendants invited error and could not complain on appeal). In determining whether the invited error doctrine was applicable, courts have also considered whether a defendant affirmatively assented to the error, materially contributed to it, or benefited from it. *See, e.g., State v. LeFaber,* 128 Wn.2d 896, 904, 913 P.2d 369 (1996) (Alexander, J.,

dissenting) (considering distinction between defendant's failure to object to error and affirmatively assent to error); *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (considering whether defendant materially contributed to error); *People v. Thompson*, 50 Cal. 3d 134, 157, 785 P.2d 857, 266 Cal. Rptr. 309 (1990) (considering whether defendant benefited from closure).

¶ 27 While *Momah* does not present a classic case of invited error, the doctrine and the factors courts have used in cases applying it are helpful for the purposes of determining the appropriate remedy in this case. In harmonizing the defendant's rights under article I, section 22, we consider Momah's tactical choices and apply the basic premise of the invited error doctrine to determine what, if any, relief should be granted.

¶ 28 Momah asserts that his failure to object does not constitute a waiver of his public trial right such that he is prohibited from raising this issue for the first time on appeal and seeking a new trial. While Momah is correct in terms of the ability to raise the issue, in none of the cases cited as support do the defendants affirmatively advocate for closure, argue for the expansion of the closure, and benefit from it. *See, e.g.*, *Easterling*, 157 Wn.2d 167 (defendant denied opportunity to object and was not permitted to participate in closed hearing on codefendant's motion to sever); *Bone-Club*, 128 Wn.2d 254 (defendant denied opportunity to object and was not permitted to participate in the closed pretrial suppression

hearing). Momah's situation is distinguishable from that of other defendants in closure cases. Additionally, being able to raise an issue on appeal does not automatically mean reversal is required.

¶ 29 From the outset of trial, we presume Momah made tactical choices to achieve what he perceived as the fairest result. Before in-chambers voir dire began, defense counsel, the prosecution, and the judge discussed numerous proposals concerning the juror selection. TPA (Oct. 6, 2005) at 67-91; TPA (Oct. 10, 2005) at 4-7; TPA (Oct. 11, 2005) at 1-18. Although Momah was provided the opportunity to object to the in-chambers proposal, he never objected. Further, he gave no indication that a closed voir dire might violate his right to public trial. To the contrary, defense counsel made a deliberate choice to pursue in-chambers voir dire to avoid "contamination" of the jury pool by jurors with prior knowledge of Momah's case. Defense counsel affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning. As a result of this closure and defense counsel's active participation in the questioning, Momah was able to exercise numerous challenges for cause, removing biased and partial jurors from the venire. We find all of these actions by Momah's counsel and the trial judge occurred in order to promote and safeguard the right to an impartial jury.

¶ 30 As we stated above, courts grant automatic reversal and remand for a new trial only when errors are structural in nature. An error is structural when it necessarily renders a criminal trial fundamentally

unfair or an unreliable vehicle for determining guilt or innocence. In each case, the remedy must be appropriate to the violation.

¶ 31 We hold the closure in this case was not a structural error. The closure occurred to protect Momah's rights and did not actually prejudice him. The record reveals that due to the publicity of Momah's case, the defense and the trial court had legitimate concerns about biased jurors or those with prior knowledge of Momah's case. The record also demonstrates that the trial court recognized the competing article I, section 22 interests in this case. The court, in consultation with the defense and the prosecution, carefully considered the defendant's rights and closed a portion of voir dire to safeguard the accused's right to an impartial jury. Further, the closure was narrowly tailored to accommodate only those jurors who had indicated that they may have a problem being fair or impartial. Momah affirmatively accepted the closure, argued for the expansion of it, actively participated in it, and sought benefit from it. Thus, the underlying facts and impact of the closure in *Momah* are significantly different from those presented by our previous cases. Reversal of Momah's conviction and remand of his case cannot be the remedy under these circumstances. We affirm the jury's determination of guilt.

MADSEN, OWENS, FAIRHURST, and J.M. JOHNSON, JJ., and PENOYAR, J., PRO TEM, concur.

CONCUR BY: Joel M. Penoyar, Justice Pro Tem.

CONCUR

¶ 32 PENOYAR, J.* (concurrence) – I concur in the majority authored by Justice Charles Johnson. In addition, I concur because it is not argued that any person wishing to attend the proceedings was excluded. In sporting parlance, "No harm, no foul."

DISSENT BY: Gerry L. Alexander

DISSENT

¶ 33 ALEXANDER, C.J. (dissenting) – I dissent because, in my view, the majority wrongly concludes that Charles Momah "affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it." Majority at 327. Except for Momah's tacit participation in the closed-door questioning, there is no support in the record for any of these conclusions. Indeed, the record discloses that Momah did not affirmatively assent to closure, did not argue for the expansion of it, was not asked if he objected to it, and did not benefit from it. The record demonstrates, rather, that the trial court closed jury voir dire on its own initiative and failed to consider any of the constitutional rights we discussed in *State v.*

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* Judge Joel M. Penoyar is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Neither did the trial court engage in the closure analysis made mandatory by that decision. The trial court's closure of the courtroom to the public without first performing the *Bone-Club* test is a structural error that cannot be deemed harmless. I would, therefore, reverse Momah's conviction and remand for a new trial.

I

¶ 34 The Washington Constitution, like the Sixth Amendment to the United States Constitution, guarantees that in criminal proceedings, the accused has the right to a "public trial by an impartial jury." CONST. art. I, § 22; U.S. CONST. amend. VI. But unlike the United States Constitution, the Washington Constitution contains additional provisions that ensure the right to open court proceedings. One of these provisions is article I, section 10, which recognizes the public's right to have "[j]ustice in all cases . . . administered openly." The other is article I, section 35, which provides that victims of crimes "have the right to . . . attend trial and all other court proceedings the defendant has the right to attend." The latter provision is a "basic and fundamental right[ ]," which "ensure[s] victims a meaningful role in the criminal

justice system and . . . accord[s] them due dignity and respect." CONST. art. I, § 35.[3]

¶ 35 The aforementioned sections of the Washington Constitution "serve complementary and interdependent functions in assuring the fairness of our judicial system." *Bone-Club*, 128 Wn.2d at 259. Because these provisions safeguard the right to public trials, courtrooms should be closed only in "rare circumstances." *Id.* at 258. In order to protect the various interests implicated by the aforementioned constitutional provisions, our court has developed a strict, well-defined standard for closing a courtroom, which complies with both federal and state constitutional requirements. It is the *Bone-Club* "test."[4]

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[3] The public trial right extends to jury selection. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006).

[4] The five requirements of the test are as follows:

> "1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
>
> "2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> "3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
>
> "4. The court must weigh the competing interests of the proponent of closure and the public.
>
> "5. The order must be no broader in its application or duration than necessary to serve its purpose."

(Continued on following page)

II

¶ 36 The *Bone-Club* test is a standard by which trial court judges can determine whether or not a courtroom should be closed to the public. Under this standard, the trial court should enter specific findings to support closure of the courtroom or, at the very least, set forth on the record what facts caused it to conclude that closure was justified. Findings spread on the record are particularly critical in a case where no one objects to closure, since in such circumstances the judge has an overriding responsibility to safeguard the constitutional right to a public trial. As I noted above, the record reveals that here, the trial judge closed the courtroom on his own initiative and he did so without any discussion of the *Bone-Club* criteria. Furthermore, the trial judge did not justify the closure by entering written findings of fact or setting forth oral findings on the record. In the absence of a closure hearing and explicit findings justifying the closure, the constitutionally required standard for closing a courtroom is not met. *See In re Pers. Restraint of Orange*, 152 Wn.2d 795, 810-11, 100 P.3d 291 (2004) (failure to follow the *Bone-Club* closure test resulted in a record that demonstrated the trial judge did not identify a compelling interest, fully

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Bone-Club, 128 Wn.2d at 258-59 (alteration in original) (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

considered alternatives, or weighed competing interests).

A

¶ 37 In affirming the trial court, the majority focuses on what it determines was the trial judge's justification for closing the courtroom. The claimed justification was the trial court's concern that prospective jurors could become biased through exposure to the questioning of members of the jury venire who had prior knowledge of the case. While this concern is understandable, it does not justify closure of the courtroom during the jury voir dire. As I point out hereafter, there were less restrictive means of preventing juror contamination than a complete closure of the courtroom.

¶ 38 Contrary to the majority's reading of the record, Momah's counsel did not ask the trial judge to close the courtroom during jury voir dire. Neither did he agree to the closure. Momah's counsel simply suggested that jurors be questioned individually in a courtroom. During the ensuing discussion about how to handle the individual questioning, the State broached the idea of questioning jurors in a private setting. Ultimately the trial judge determined that the questioning of individual jurors would take place in chambers. Responding to a juror who said he did not want to be individually questioned, the trial judge informed the venire that he had "decided it would be in everybody's interest if you would be questioned

individually." Report of Proceedings (Oct. 11, 2005) at 19.

¶ 39 During this closed phase of voir dire, jurors were shuttled between the main jury room and two different courtrooms. One of the courtrooms held a subset of the venire that included jurors who had prior knowledge of the case and whose questionnaires indicated that service on the jury would be a hardship. Once the hardship issues were dealt with, the trial judge arranged to have the other jurors brought into chambers one at a time for individual questioning. After a break for lunch, the jury selection process reconvened in another courtroom. During this phase, some members of the jury venire remained in the courtroom while others were taken into a jury room for individual questioning.[f] Before prospective jurors were questioned individually in the jury room, the trial judge said the following:

> I guess we have twenty folks outside in the hall. What I propose to do is have them come into the courtroom, we will move to the jury room for the individual questioning, and question them one at a time. I thought about having them in the jury room, but there is (sic) only 16 chairs.

Id. at 105.

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[f] In total, 17 jurors were questioned privately, 13 in chambers, and 4 in the jury room.

¶ 40 On the third day of jury selection, some prospective jurors were again questioned individually. Unlike the earlier process, however, the trial judge directed that individual questioning occur in the courtroom. On this occasion, those persons designated for individual questioning were held as a group in a jury room and summoned one at a time into the courtroom for questioning.

¶ 41 There is, in my view, a substantial distinction between, on the one hand, questioning prospective jurors individually and, on the other, questioning them privately in chambers or in a jury room with the door closed. As noted above, the questioning of prospective jurors individually in order to avoid juror contamination is appropriate in certain cases and the trial judge may well have had legitimate reasons for concluding that certain members of the jury venire be questioned individually. But this could have been done in open court. Questioning prospective jurors in the privacy of chambers or a jury room with the doors of these rooms closed to the public is a de facto courtroom closure. The question then becomes was the courtroom closure justified?

B

¶ 42 Our cases require a trial court to "resist a closure motion except under the most unusual circumstances." *Bone-Club*, 128 Wn.2d at 259. As noted above, the record demonstrates that neither party advocated for closure of voir dire. Instead, the trial

judge closed the courtroom without prompting to individually question prospective jurors in the privacy of chambers and later in a closed jury room. We have previously applied the *Bone-Club* criteria to this type of closure. *See Orange*, 152 Wn.2d at 808 (temporary closure of voir dire is a closure that must meet the *Bone Club* standard).

¶ 43 Under *Bone-Club*, the proponent of closure must identify a compelling interest for closure, and if that interest is something other than the accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that interest. When neither party proposes closure, it is the trial judge's responsibility to identify the compelling interest or interests that support closure. The record clearly demonstrates that the closure was primarily motivated by the trial judge's preference for questioning certain members of the jury voir dire in private. Unfortunately, the record lacks any hint that the trial judge considered any other interests prior to conducting a portion of juror voir dire in a nonpublic setting. Without explicit findings in the record, there is no way for this court to determine whether the trial judge considered whether keeping voir dire open to the public presented a "serious and imminent threat" to the selection of a fair and impartial jury.

¶ 44 The *Bone-Club* criteria directs a trial judge to consider the least restrictive means available to protect threatened interests. This means that the judge must consider alternatives to closing the courtroom. *Bone-Club*, 128 Wn.2d at 260. Here, there was

an obvious alternative to closure, that being the individual questioning of jurors in the courtroom. This could easily have been accomplished because, as the record shows, there were at least three rooms available among which jurors were shuttled – two courtrooms and the main jury room. Additionally, there was a jury room adjacent to one of the courtrooms that could have been used to hold jurors until they were ready to be brought into the courtroom for individual questioning. The ease with which jurors could have been summoned for questioning in open court rather than in a room closed to the public is demonstrated by the fact that the trial judge used this method for the questioning of jurors on the third day of voir dire. Thus, it is clear that a less restrictive alternative to closure was readily available. *See Orange*, 152 Wn.2d at 810 (describing alternatives to closure that the trial court failed to consider).

C

¶ 45 The *Bone-Club* test also requires the trial judge to weigh the interests in favor of closure against competing interests. Regrettably, the trial judge closed the courtroom without providing any analysis and discussion on the record concerning the rights of the defendant, the public, or victims to have the trial conducted publicly. Absent the required analysis, this court cannot determine whether the

constitutional rights held by those parties were considered or ignored.[6]

¶ 46 The majority incorrectly assumes that closure of the courtroom during a portion of jury selection was essential to protect Momah's right to an impartial jury. To the contrary, it is the individual questioning of prospective jurors that protected that right, not the closure of voir dire to the public. Thus, it is misleading to frame the issue as a weighing test between the right to a public trial and the right to an impartial jury. Rather, the competing interests were the right to a public trial and the trial judge's preferred method for conducting voir dire.

¶ 47 The procedure employed by the trial judge did not conform to our precedent which, as noted above, requires the trial court to eschew closing a courtroom without first applying and weighing the five criteria set forth in *Bone-Club*. *State v. Easterling*, 157 Wn.2d

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[6] In his concurrence, Justice Pro Tempore Penoyar suggests that there is "'[n]o harm, no foul'" because there is no indication that anyone wishing to attend the court proceedings was excluded. Concurrence at 156. Whether members of the public or the media were present would not necessarily be reflected in the record. Furthermore, if there were people in the courtroom when the closure decision was made, they may not have known that they had the right to object. It is clear that the trial judge did not inform anyone of their right in that regard. *See Bone-Club*, 128 Wn.2d at 261 (noting that "an opportunity to object holds no 'practical meaning' unless the court informs potential objectors of the nature of the asserted interests" (quoting *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 39, 640 P.2d 716 (1982))).

167, 175, 137 P.3d 825 (2006). The error here, in sum, was not necessarily closure of the courtroom, but the trial court's failure to perform the *Bone-Club* closure test prior to doing so.

III

¶ 48 The lack of specific findings in the record justifying closure is presumptively prejudicial to the constitutional right to have trials conducted publicly. *Orange*, 152 Wn.2d at 814; *Bone-Club*, 128 Wn.2d at 261-62. This court has previously held that when the trial court fails to consider and make specific findings concerning the public trial right, we cannot determine whether the closure was warranted. *State v. Brightman*, 155 Wn.2d 506, 518, 122 P.3d 150 (2005). In such situations, the transparency and fairness of criminal trials must be protected. *Id.* at 178. The presumptive remedy for an unjustified closure of a criminal trial is remand for a new trial.[7] *Id.* at 174; *Bone-Club*, 128 Wn.2d at 256.

¶ 49 The majority holds that a new trial is inappropriate for a defendant who seeks advantage by failing to object to a courtroom closure. This determination is premised on the faulty belief that closure somehow benefited Momah. As explained above, Momah's interest in an impartial jury could

[7] Unlike the majority, I will not speculate as to whether Momah received a fair trial after the trial judge inappropriately closed the courtroom without performing a *Bone-Club* analysis.

easily have been protected without closing the courtroom. Thus, the lack of an objection by Momah cannot be said to be a "tactical choice" suggested by the majority. Furthermore, the fact that Momah never requested closure of the courtroom and merely asked through his counsel that individual questioning of jurors take place in a courtroom belies the conclusion that trial tactics were in play.

¶ 50 It must be noted, also, "that a defendant does not waive his right to appeal an improper closure by failing to lodge a contemporaneous objection." *Easterling*, 157 Wn.2d at 176 n.8 (citing *Brightman*, 155 Wn.2d at 514-15). Significantly, the notion that waiver of a constitutional right can be implied by the actions of a defendant has been rejected by this court. *See City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984) (holding that the right to a jury trial can only be waived affirmatively and unequivocally). Because the right to a public trial is a right guaranteed to defendants in the same provision of the state constitution that guarantees the right to a trial by jury, it logically follows that the waiver of that right must be as express as that for waiver of a jury. In my view, the burden is on the trial judge to make certain that the defendant has affirmatively waived this constitutional right before taking it away from him. *Easterling*, 157 Wn.2d at 176. That waiver should be "knowing, voluntary, and intelligent." *Acrey*, 103 Wn.2d at 208-09. Regrettably, the trial judge failed to inform Momah of his right to a public trial and failed

to provide him with the opportunity to object to the closure.

¶ 51 Lastly, I must observe that a new trial is not a "windfall" for anyone when public trial rights are set aside for the sake of expediency. When a trial is closed without the benefit of a *Bone-Club* analysis, there is a high risk of violating public trial rights and damaging the public's trust of its courts. We must always remember the "constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts [and] is integral to our system of government." *Easterling*, 157 Wn.2d at 187 (Chambers, J., concurring). As Justice Chambers said in his concurrence in *Easterling*:

> "The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust. This openness is a vital part of our constitution and our history. The right of the public, including the press, to access trials and court records may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified."

Id. at 185 (quoting *Dreiling v. Jain*, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004)).

¶ 52 Justice Chambers went on to say:

> Our constitution requires that justice be administered openly in court*rooms* just as much as it must be reflected in open court *records*. Fidelity to the constitution requires some meaningful remedy if a courtroom is improperly closed.
>
> . . . .
>
> . . . I completely agree . . . that there may be a case, there may be many cases, where substantive justice to the parties was done behind locked doors. Defendants themselves might even want the courtrooms closed for many rational reasons. But whether or not the defendant got due process of law is a completely different question from whether our article I, section 10 was violated. While a defendant may not herself be harmed by a hearing in a closed courtroom, there is no case where the harm to the principle of openness, as enshrined in our state constitution, can properly be described as de minimis. Thus, I cannot agree that there could ever be a proper exception to the principle that a courtroom may be closed without a proper hearing and order.

Id. at 185-86 (citing *Orange*, 152 Wn 2d at 806-07).

IV

¶ 53 From the record we have, there appears to be no justification for closing the courtroom to the

public. If there was a valid reason for doing so; it is not apparent from the record because the trial judge did not perform a *Bone-Club* analysis prior to closing the courtroom. Neither did he make formal findings or conclusions justifying the closure. Thus, it is impossible to know exactly what motivated the trial judge's decision to partially close voir dire. While it may appear to some that a new trial is a steep price to pay for the closure of the courtroom for a portion of a trial, the expense of a retrial pales in comparison to the harm done to the constitutionally guaranteed right to have justice in this state administered openly.

¶ 54 For the foregoing reasons, I dissent.

SANDERS and CHAMBERS, JJ., concur with ALEXANDER, C.J.

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHARLES MOMAH, Petitioner.	NO. 81096-6 **ORDER** C/A NO. 58004-3-I

Department I of the Court, composed of Chief Justice Alexander and Justices C. Johnson, Sanders, Owens and J. Johnson, at its April 1, 2008, Motion Calendar, considered whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is granted only on the public trial issue. The motion to consolidate is denied. This case is set for oral argument on May 15, 2008, as the 4th case. In supplemental briefs, the parties are directed to address the issue whether Petitioner waived any challenge by participating in the in chambers voir dire.

DATED at Olympia, Washington this 1st day of April, 2008.

For the Court

/s/ Gerry L. Alexander
CHIEF JUSTICE

141 Wn. App. 705; 171 P.3d 1064;
2007 Wash. App. LEXIS 3017

THE STATE OF WASHINGTON, *Respondent*,
v. CHARLES MOMAH, *Appellant*.

No. 58004-3-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

November 13, 2007, Filed

COUNSEL: *Sheryl G. McCloud*, (of *Law Offices of Sheryl Gordon McCloud*), and *Jeffrey L. Fisher*, (of *Davis Wright Tremaine LLP*), for appellant.

Daniel T. Satterberg, Interim Prosecuting Attorney, and *Lee D. Yates, Deputy*, for respondent.

JUDGES: Written by: Cox, J. Concurred by: Grosse, J., Appelwick, C.J.

OPINION BY: Cox

OPINION

¶1 Dr. Charles Momah appeals his judgment and sentence based on convictions of rape and indecent liberties involving several of his medical patients. We hold that he has failed to carry his burden to show that the trial court violated his constitutional right to a public trial by the manner in which the court conducted voir dire of potential members of the jury who were questioned individually. The court did not abuse its discretion by admitting evidence of certain of Dr. Momah's prior bad acts under the common scheme or plan exception.

Likewise, the court did not abuse its discretion by excluding evidence of alleged prior bad acts of one of the witnesses against Dr. Momah. The court properly exercised its discretion in denying Dr. Momah's motion to sever. And the court did not abuse its discretion in denying his mistrial motion. We affirm.

¶2 Dr. Momah was a gynecologist and purported fertility specialist with offices in Burien and Federal Way. In 2003, one of his patients, H.P., went to a hospital and reported that Dr. Momah had raped her. Once the allegations were made public, many other women came forward with complaints that Dr. Momah had sexually abused them. These allegations became the subject of extensive media coverage.

¶3 After investigation, the State charged Dr. Momah with seven counts arising from these incidents. Three of the counts were severed from the trial in this case. The remaining four counts were tried in this action, including two counts of indecent liberties, one count of second-degree rape, and one count of third-degree rape.

¶4 Due to the nature of the charges and the extensive media coverage, a large number of potential jurors were called for voir dire by the parties and the court. Some of the potential jurors asked to be questioned individually, and the court and both counsel agreed to honor those specific requests. Some jurors had been exposed to media coverage about the case, also requiring individual juror questioning to

avoid jury contamination. We discuss in more detail later in this opinion how voir dire was conducted.

¶5 Following the selection of the jurors and alternates, the matter was tried over the course of 15 trial days. The jury found Dr. Momah guilty as charged.

¶6 He appeals.

RIGHT TO PUBLIC TRIAL

¶7 Dr. Momah argues that the trial court violated his right to a public trial by the manner in which it conducted voir dire of the prospective jurors who were questioned individually. Because he fails in his burden to show there was a constitutional violation in this case, we disagree.

¶8 Article I, section 22 of the Washington State Constitution guarantees criminal defendants the right to a speedy, public trial. Similarly, article I, section 10 provides that "[j]ustice in all cases shall be administered openly. . . ." These rights extend to jury selection, which is essential to the criminal trial process.[1]

¶9 To protect these rights, a court faced with a request for a trial closure must weigh five factors, referred to herein as the *Bone-Club* factors, to balance

[1] *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

the competing constitutional interests.[2] To overcome the presumption of openness, the party seeking closure must show an overriding interest that is likely to be prejudiced and that the closure is narrowly tailored to serve that interest.[3] The trial court must consider alternatives and balance the competing interests on the record.[4]

¶10 This test mirrors the one articulated by the United States Supreme Court to protect the Sixth Amendment right to a public trial and the First Amendment right to open hearings.[5]

¶11 We look to the plain language of the closure request and order to determine whether closure occurred, thus triggering the *Bone-Club* factors.[6]

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[2] *Id.* at 805-07 (quoting *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995)).

[3] *Id.* at 806 (quoting *Waller v. Georgia*, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (quoting *Press-Enter. Co. v. Superior Court of Cal.*, 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984))).

[4] *Id.*

[5] *Id.* (citing *Waller*, 467 U.S. at 45-47).

[6] *Orange*, 152 Wn.2d at 808; *Bone-Club*, 128 Wn.2d at 261; *State v. Brightman*, 155 Wn.2d 506, 516, 122 P.3d 150 (2005); *see also Orange*, 152 Wn.2d at 823 (Madsen, J., concurring) ("[I]n order to determine whether a trial closure violates the constitutional standard applicable to the open trial guaranty, a reviewing court must consider . . . the language of the closure ruling . . ."); *United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003) ("'The denial of a defendant's Sixth Amendment right to a public trial requires some affirmative act by the trial court

(Continued on following page)

¶12 Once the reviewing court determines there has been a violation of the constitutional right to a public trial right, "'[p]rejudice is presumed,'" and a new trial is warranted.[7]

¶13 On the other end of the spectrum from a full closure is a trial court's inherent authority and broad discretion to regulate the conduct of a trial.[8] Thus, a "closure" in which one disruptive spectator is excluded from the courtroom for good cause will not violate the defendant's right to a public trial even absent an analysis of the *Bone Club* factors.[9] Likewise, limited seating by itself is insufficient to violate the defendant's public trial right.[10]

¶14 Here, Dr. Momah focuses his argument exclusively on the events of October 11, 2005, the second day of voir dire. It is undisputed that he neither bases his argument on any other day of voir

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meant to exclude persons from the courtroom.'" (quoting *United States v. Al-Smadi*, 15 F.3d 153, 155 (10th Cir. 1994))).

[7] *Orange*, 152 Wn.2d at 814 (alteration in original) (quoting *Bone-Club*, 128 Wn.2d at 261-62 (citing *State v. Marsh*, 126 Wash. 142, 146-47, 217 P. 705 (1923); *Waller*, 467 U.S. at 49 & n.9)).

[8] *See State v. Gregory*, 158 Wn.2d 759, 816, 147 P.3d 1201 (2006).

[9] *See id.*

[10] *See, e.g.*, *Shryock*, 342 F.3d at 974, cited in *Brightman*, 155 Wn.2d at 517.

dire nor does he object to voir dire for reasons other than those described below.[11]

¶15 On the second day of voir dire, the court convened the trial in Room E-942, the presiding courtroom in the King County Courthouse.[12] During the prior day of voir dire, 48 potential jurors were excused, leaving 52 potential jurors to be examined further.[13] The record reflects the following exchanges between the court and counsel for the parties regarding questioning of the remaining potential jurors:

> THE COURT: . . . I made a list of jurors who wanted to have private questioning about various issues. On that list I have eight jurors who wanted private questioning.
>
> . . . .
>
> MR. ALLEN [counsel for Dr. Momah]: Your Honor, it is our position and our hope that the Court will take everybody individually, besides those ones we have identified that have prior knowledge. Our concern is this: they may have prior knowledge to the extent that that might disqualify themselves, or we have the real concern that they will contaminate the rest of the jury.
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> . . . .

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[11] Appellant's Opening Brief at 26-27.

[12] Report of Proceedings (Oct. 11, 2005) at 2.

[13] *Id.*

> MR. ROGOFF [counsel for the State]: I agree.[14]

¶16 Thereafter, the court divided the prospective jurors who were to be questioned individually into two groups, the first group of 20 to be questioned that morning. The rest were released with instructions to return for questioning that afternoon.

¶17 Shortly after the release of the potential jurors, the record reflects that the court, both parties' counsel, Dr. Momah, and the court reporter moved into chambers adjoining the presiding courtroom. Once in chambers, the record states:

> THE COURT: We have moved into chambers here. The door is closed. We have the court reporter present, as well as all counsel and the defendant, along with the Court and juror number 36. . . .[15]

¶18 Following questioning by counsel and the court, prospective juror number 36 left chambers and prospective juror 2 entered chambers. The record does not reflect whether the door to chambers was closed during this questioning or subsequent individual questioning of other prospective jurors during the morning session.

¶19 The court recessed for lunch and reconvened in room West 813 of the King County

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[14] Report of Proceedings (Oct. 11, 2005) at 2, 4.

[15] *Id.* at 19-20.

Courthouse for the afternoon session. The record reflects the following statement by the court prior to the arrival of the second group of prospective jurors:

> THE COURT: I guess we have twenty folks outside in the hall. What I propose to do is have them come into the courtroom, we will move to the jury room for the individual questioning, and question them one at a time. I thought about having them in the jury room, but there is [sic] only 16 chairs. Secondly, we reserved 50 jurors for tomorrow.[16]

¶20 After further colloquy between the court and counsel, the prospective jurors entered the courtroom. The trial judge explained to the group that individual questioning would continue and then adjourned to the jury room with the lawyers for both parties, Dr. Momah, and the court reporter. The record does not reflect whether the door to the jury room was open or closed during any of the individual examinations of the prospective jurors that afternoon.

¶21 Court adjourned for the day at 3:10 p.m., after prospective juror number 41 left the jury room.

¶22 Dr. Momah makes two main arguments. First, he argues that this record establishes that the trial court closed voir dire, infringing on his right to a public trial. Second, he argues that this record supports the view that the burden of proving there

[16] *Id.* at 105.

was no closure and that the requirements of *Bone-Club* and its progeny were fulfilled shifted to the State. We disagree with both of these arguments.

¶23 Nowhere in this record is there any evidence that the trial judge expressly closed voir dire to the public or the press in violation of any of the controlling cases. Rather, the record expressly shows that the court, in response to the express request of Dr. Momah, agreed to allow voir dire by individual questioning of prospective jurors who indicated prior knowledge about the case. Significantly, his request was based on the concern that prospective jurors might have knowledge about the case that could disqualify them or that they might contaminate the rest of the prospective jurors with such knowledge. In addition, the court and the parties agreed to individually question jurors in response to their express requests. The State agreed that individual questioning was best to avoid the risk of a mistrial due to certain matters that are not relevant to our analysis in this case. There simply is no indication in the record that individual questioning was for the purpose of excluding either the press or the public from this trial.

¶24 We note also that there is nothing in the record to indicate that any member of the public (including members of Dr. Momah's family) or the press was excluded from voir dire. The court reporter in this case scrupulously recorded everything that took place during the morning session from the time the trial judge, both parties' counsel, Dr. Momah, and

the court reporter went into chambers adjacent to the presiding courtroom. Similarly, the court reporter also scrupulously recorded all that took place from the time the trial judge, counsel, Dr. Momah, and the court reporter went into the jury room in room West 813 after the noon recess. Other than the entry and exit of the individual jurors and the questioning that ensued for each, there is nothing in this record indicating any attempt by either the press or the public (including members of Dr. Momah's family) to gain admittance to witness voir dire. We simply do not know what would have happened if such an attempt had been made either during the morning or afternoon sessions of voir dire. We will not speculate on whether the trial court would have ordered closure if any attempt had been made by anyone to join the judge, counsel, Dr. Momah, and the court reporter in chambers or in the jury room.

¶25 Dr. Momah relies on the seminal Washington cases on courtroom closure. But the closures in each of those cases are distinguishable in important respects from the October 11 day of voir dire in this case.

¶26 In *State v. Bone-Club*, the trial court "ordered closure" of the courtroom by stating, "All those sitting in the back, would you please excuse yourselves at this time."[17] In discussing whether the defendant could have waived his rights, the supreme

[17] 128 Wn.2d 254, 256, 906 P.2d 325 (1995).

court noted, "The ***motion to close,*** not Defendant's objection, ***triggered the trial court's duty to perform the weighing procedure.***"[18]

¶27 Similarly, in *In re Personal Restraint of Orange*, the trial court ordered closure by the following statement:

> *I am ruling* no family members, no spectators will be permitted in this courtroom during the selection of the jury because of the limitation of space, security, etcetera [sic]. *That's my ruling.*[19]

The supreme court examined the "***plain language of its ruling***" in order to determine that the trial court had effectuated a permanent, full closure of the courtroom that day, thus requiring an analysis of the *Bone-Club* factors.[20]

¶28 In *State v. Brightman*, the trial court told the attorneys in a pre-trial proceeding to:

> tell the friends, relatives, and acquaintances of the victim and the defendant that the first two or three days for selecting the jury the courtroom is packed with jurors, they can't observe that.[21]

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[18] *Id.* at 261 (emphasis added).

[19] 152 Wn.2d 795, 802, 100 P.3d 291 (2004) (emphasis and alteration in original).

[20] *Id.* at 808 (emphasis added).

[21] 155 Wn.2d 506, 511, 122 P.3d 150 (2005).

Although the supreme court did not inquire whether this order had actually been enforced, it emphasized that the court in *Orange* looked "*solely to the transcript of the trial court's ruling*" to determine whether the order constituted a closure.[22] The court went on to hold:

> ***[O]nce the plain language of the trial court's ruling imposes a closure,*** the burden is on the State to overcome the strong presumption that the courtroom was closed.[23]

¶29 In this case, the trial court simply never ordered that the proceeding be closed to any spectators or family members. Looking to the plain language of the transcript, as these cases require us to do, it is apparent that no statement or order by the trial court triggered application of the *Bone-Club* factors or shifted the burden to the State to prove that the proceeding was open. Rather, the trial court and both parties' counsel recognized the space constraints and the need to question jurors individually. The court concluded that the only way to accommodate these concerns was to leave the jury venire in the courtroom and conduct individual juror questioning in the only other available room – chambers – that was available during the morning session. Similar analysis applies to the court's use of the jury

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[22] *Id.* at 516.

[23] *Id.* (emphasis added).

room during the afternoon session in Room West 813 of the King County Courthouse. Nothing in the trial court's language or actions indicates that any member of the public, aside from the other members of the jury venire, were excluded from this proceeding.

¶30 The other cases on which Dr. Momah relies are also distinguishable for the same reasons. For example, in *NBC Subsidiary (KNBC-TV), Inc. v. Los Angeles County Superior Court*, "the public and the press were ushered out of the courtroom" in response to one of the trial court's closure orders.[24]

¶31 Relying on the *NBC* case, Dr. Momah argues that all proceedings conducted in chambers are per se closed to the public. But the court in that case actually concluded that "although in ***some situations*** it may be appropriate to exclude the public and the press from chambers proceedings," those proceedings are still part of the trial process, subject to the same rules for closure.[25]

¶32 The dictionary definitions and other cases Dr. Momah cites likewise do not establish that a proceeding is automatically closed to the public if it occurs in chambers. They are mere observations that proceedings in chambers are often closed to the public. Moreover, we conclude that the trial court's

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[24] 20 Cal. 4th 1178, 1186, 86 Cal. Rptr. 2d 778 (1999).

[25] *Id.* at 1215.

statement in this case, "We have moved into chambers here. The door is closed," was also nothing more than an observation. Of course, a "door" to a courtroom being closed, which occurs in most court proceedings, is not the same as a "proceeding" in that courtroom being closed to the public.

¶33 Dr. Momah also relies on a recent case from Division Three, *State v. Frawley*.[26] We decline to follow that case.

¶34 There, the court reversed Frawley's conviction and remanded for a new trial based on the fact that one day of voir dire was conducted in chambers, outside Frawley's presence. It is unclear from the facts of that case whether any member of the public or press was actually prevented from watching the proceedings, but it appears from the opinion that the parties were concerned about questioning jurors while other members of the public were present.[27]

¶35 In contrast, Dr. Momah was present both in chambers and in the jury room for the October 11 day of voir dire. Another distinction is that the trial court and the parties here were concerned with questioning potential jurors out of the presence of the rest of the

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[26] 140 Wn. App. 713, 167 P.3d 593 (2007).

[27] *See id.* at 726 (Brown, J., dissenting) (noting that Frawley's agreement with the chambers questioning was based on his preference that potential jurors be questioned outside the presence of the public).

jury venire, not the public or press. Their failure to mention the public or press implies that they did not intend on excluding either from observing voir dire.

¶36 To the extent that *Frawley* holds that all in-chambers proceedings are per se closed to the public, we decline to follow Division Three's reasoning in that case.

¶37 To summarize, Dr. Momah has failed to carry his burden to show that the trial court closed his trial, depriving him of his constitutional right to a public trial. Accordingly, we do not reach whether any closure was justified under the standards stated in *Bone-Club* and subsequent cases.

¶38 We affirm the judgment and sentence.

¶39 The remaining issues of this opinion are not of precedential importance. Accordingly, the remainder of this opinion is not published.[25]

CHARACTER EVIDENCE

Dr. Momah next argues that the trial court abused its discretion in admitting testimony of three witnesses that Dr. Momah had allegedly sexually abused in the past. Conversely, Dr. Momah argues that the trial court erred in declining to admit evidence that victim H.P. had allegedly consented to

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[25] *See* RCW 2.06.040.

sex with another doctor in the past. We reject both arguments.

Evidence of a person's character, trait, or prior bad acts is generally inadmissible to prove that he acted in conformity with a bad character trait.[29] But evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as proof of a motive or a plan. Before admitting such evidence, a trial court must:

> (1) identify the purpose for which the evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove an element of the crime charged[,] and (3) weigh the probative value of the evidence against its prejudicial effect.[30]

The potential for prejudice from prior bad acts is highest in sex offense cases.[31]

The common scheme or plan exception allows proof that the defendant devised a plan to repeatedly commit separate but very similar crimes against similar victims under similar circumstances.[32] It requires proof that the prior acts are:

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[29] ER 404(a)(1), (b).

[30] *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

[31] *State v. Ramirez*, 46 Wn. App. 223, 227, 730 P.2d 98 (1986).

[32] *Lough*, 125 Wn.2d at 855.

> (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.[34]

Under this type of plan, there must be a high level of similarity between the acts, "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations."[35]

Although the prior acts must be markedly similar to the charged acts, the common scheme or plan exception is to be distinguished from the modus operandi exception, which requires highly unique and identical circumstances (often referred to as signature crimes) to prove the suspect's identity.[36] Under the common scheme or plan exception, the acts must be highly similar, but not identical or unique.[37]

For example, a common scheme or plan existed in *State v. DeVincentis* when the defendant molested two children in similar ways.[38] In both circumstances, he

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[34] *Id.* at 852.

[35] *State v. DeVincentis*, 150 Wn.2d 11, 19, 74 P.3d 119 (2003) (internal quotations omitted), *habeas corpus denied by DeVincentis v. Quinn*, No. C06-680-JLR, 2007 U.S. Dist. LEXIS 25894, 2007 WL 1059304 (W.D. Wash. April 5, 2007).

[36] *See id.* at 21 (noting the importance of this distinction).

[37] *Id.*

[38] 150 Wn.2d 11, 74 P.3d 119 (2003).

befriended young girls, desensitized them by wearing almost no clothing around the house, asked the victims to remove their clothes, and asked them to perform the same sexual act on him.[38]

And in *State v. Lough*, a common scheme or plan was proved by the testimony of four women who were in a personal relationship with the defendant, a paramedic. The women each stated that the defendant offered her a drink or medication of some kind that rendered her unconscious, and then raped her.[39]

Washington's rape shield statute also addresses the admissibility of prior sexual acts. But that statute applies to victims, not criminal defendants.[40] It prohibits the admission of evidence of a victim's prior sexual history on the issue of credibility under any circumstances.[41] One purpose of the statute is to prevent the jury from relying on the illogical premise that a woman who consents to sex is unchaste, and such an unchaste woman is more likely to consent to sex again in the future.[42]

Under the statute, a trial court may admit evidence of a victim's prior sexual acts as relevant to the issue of consent, not credibility, if the probative

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[38] *Id.* at 16.

[39] *Lough*, 125 Wn.2d at 850.

[40] RCW 9A.44.020(2).

[41] RCW 9A.44.020(2); *Gregory*, 158 Wn.2d at 789.

[42] *State v. Hudlow*, 99 Wn.2d 1, 10, 659 P.2d 514 (1983).

value of the evidence substantially outweighs its prejudicial effect, and its exclusion would deny substantial justice to the defendant.[43] Evidence of a victim's past sexual behavior is only relevant to the issue of consent if the circumstances of the past acts of consent were similar to those alleged by the defendant.[44] To have such evidence admitted, a defendant must file a written pretrial motion accompanied by affidavit, stating the offer of proof.[45]

Decisions as to the admissibility of evidence are within the discretion of the trial court, and are reversible only for abuse of that discretion.[46] A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.[47] We may affirm on any ground supported by the record even if the trial court did not consider the argument.[48]

Dr. Momah's Prior Bad Acts

We conclude that the trial court did not abuse its discretion in admitting testimony of Dr. Momah's alleged acts against other women.

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[43] RCW 9A.44.020(3)(d).

[44] *Hudlow*, 99 Wn.2d at 11.

[45] RCW 9A.44.020(3)(a), (b).

[46] *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

[47] *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

[48] *State v. Michielli*, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997).

Here, after reviewing the relevant elements and case law, the trial court ruled that the testimony of K.T., C.W., and C.R. was admissible to prove a common scheme or plan. Based on stipulation by the parties, the court found that the acts occurred by a preponderance of the evidence. The court ruled that the testimony of each of the four charged victims and these three additional witnesses was relevant and not outweighed by its prejudicial effect.

This was not an abuse of the trial court's discretion. The testimony of all seven women, taken together, illustrates Dr. Momah's plan to use his special position of power as a gynecologist to sexually take advantage of his most vulnerable patients.

He convinced each woman that he could help her with her specific problem, making her feel that she had few other options. Each victim testified about a particular vulnerability known to Dr. Momah. For instance, H.P., K.T., C.W., C.R., and S.S. were to some extent dependent on the narcotics or other medications he prescribed to them. Similarly, S.S., K.T., and C.W. experienced severe pain, requiring medication from Dr. Momah. H.P., C.B., and C.W. used medical coupons and relied on Dr. Momah's generosity with respect to payment for services. C.B., R.B., and C.W. desperately wanted to become pregnant, and R.B. and C.W. believed Dr. Momah's promises that he could enable them to get pregnant when other doctors could not.

Once he had gained their trust, he began acting inappropriately. Most of the victims testified that Dr. Momah did not wear gloves or have assistants present during examinations. Many testified that at some appointments, no receptionists or assistants were present in the entire office. Dr. Momah personally called many of the women on the phone throughout their doctor-patient relationships. He performed manual exams and ultrasounds at every, or almost every, appointment with these women, even when the sole purpose of the appointment was to obtain another prescription for the same symptoms or condition.

Finally, he abused their trust by sexually taking advantage of them, usually while they were on the examination table. For example, he made sexually inappropriate comments to all of the women or asked them on dates. He touched all of the women except C.R. in a sexual manner. He used the ultrasound wand in a sexual manner with R.B. and C.B. He had sexual intercourse with H.P. on the examination table.

These acts occurred on multiple occasions for many of these women. If the women objected, he usually became angry or gruff, told them not to tell, threatened them, or told them that no one would believe them.

Each of these acts was proved by a preponderance of the evidence. Each was relevant and cross-admissible to show that the acts against S.S., C.B.,

and R.B. (Counts II through IV) actually occurred (corpus delicti) because of the similarity of Dr. Momah's acts against the other women. And these non-consensual acts were relevant to rebut Dr. Momah's defense that H.P. consented to have sex with him (Count I).

The evidence was admitted only for the purpose of proving a common scheme or plan, and the jury was so instructed.

Finally, the trial court did not abuse its discretion in concluding that the probative value substantially outweighed any prejudicial effect of the evidence, given the repeated, similar acts Dr. Momah perpetrated on these women. Although the prejudicial effect of prior sex acts can be great, this type of evidence is highly probative given the lack of other evidence available in sex cases.[49]

Dr. Momah argues that what happened to some of the women was too dissimilar to be probative. We disagree.

Dr. Momah raped H.P., whereas he only said inappropriate things to C.R. (he did not rape or touch her inappropriately). But the trial court was within its discretion in considering the testimony of all seven witnesses together and concluding that Dr. Momah's acts against them could be explained as manifestations of a single plan to use his status as a

[49] *DeVincentis*, 150 Wn.2d at 25.

gynecologist to sexually abuse his patients while they were at their most vulnerable. To the extent that C.R.'s testimony is less probative of the plan than the other witnesses because Dr. Momah did not touch her sexually, it is correspondingly less prejudicial. Dr. Momah made sexual comments to her the way he did with every other victim, and she testified to no dissimilar facts that could have prejudiced Dr. Momah.

Dr. Momah counters that the time periods the seven women saw him were too varied to be probative. But to the extent that Dr. Momah's inappropriate acts occurred repeatedly over a long period of time, then the passage of time tends to prove, rather than disprove, the existence of a common scheme or plan.[50] To the extent that the women testified that things went normally during their earlier relationship with Dr. Momah and then got worse in recent years, then remoteness is not an issue.

Dr. Momah argues that since rape is a strict liability crime and has no intent element, evidence of a common plan is irrelevant to proving intent. He further argues that because he does not deny that he had sex with H.P., corpus delicti is not at issue, so the

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[50] *See Lough*, 125 Wn.2d at 860 (repeated acts over a period of time are probative of common scheme or plan, whereas remoteness in time between acts may lead to a conclusion that the acts are dissimilar).

evidence is irrelevant to proving an element of the crime.

His arguments ignore the valid purpose of the evidence as applied to Count I – to rebut his defense that H.P. consented to the sexual encounter.[51] The lack of consent of numerous other victims under similar circumstances tends to show that H.P. did not consent in this case.

Dr. Momah asserts that Washington's jurisprudence regarding the common plan exception has been highly criticized and eviscerates the rule against propensity evidence. But the Washington Supreme Court in *DeVincentis* recently refused to overrule the rule as set forth in *Lough*, and we are bound by that decision.[52]

Finally, Dr. Momah relies on the rape shield statute to argue that his prior sexual acts are not probative of the issues in this case. He argues that the rape shield statute makes clear that prior sexual acts are not probative of either credibility or consent. He misreads the statute. Both the rape shield statute and ER 404(b) allow evidence of prior sexual acts to prove consent under certain circumstances, but never to prove credibility. Under both rules, the prior acts must be similar to the act in question in order to be

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[51] *See Williams v. State*, 110 So. 2d 654 (Fla. 1959) (evidence of a common plan used to rebut the defense of consent in a rape case), *cited with approval in Lough*, 125 Wn.2d at 857 n.14.

[52] *See DeVincentis*, 150 Wn.2d at 25.

considered even minimally relevant to the issue of whether the individual consented in this case. Thus, his argument that prior sex acts are never probative is incorrect. In addition, he cannot rely upon the rape shield statute because by its terms, it applies to victims. It was passed in part to encourage victims of sexual abuse to report their crimes.[54] This policy does not apply to him, an accused sexual perpetrator.

Dr. Momah also assigns error to the jury instruction regarding this ER 404(b) evidence for the same reasons he objects to admission of the evidence. Because the instruction properly allowed the jury to consider his alleged acts against all seven women for the proper purposes discussed above, and for no other purpose, it was proper.

H.P.'s Prior Bad Acts

Dr. Momah argues that the trial court abused its discretion in declining to allow evidence of victim H.P.'s alleged prior sexual experiences with doctors. We disagree.

During the State's direct examination of H.P., the parties and the court had a colloquy outside the presence of the jury. The prosecutor mentioned that in Dr. Momah's interview of H.P., he asked her "whether or not [H.P.] told the defendant that she had

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[54] *Hudlow*, 99 Wn.2d at 16.

slept with other doctors."[54] Dr. Momah stated that he wished to question H.P. about such incidents. His oral proffer was as follows:

> Your Honor, we are not going to raise it to show – First, I was going to bring it up [on cross] before I asked her that question. But we would be asking the Court for permission to bring it up, because this is something that Dr. Momah tells us she told him. She denied that she told him and denied that it happened, but this is going to be an issue. And I would be asking for that.[55]

The trial court ruled such evidence inadmissible because it was "not relevant."[56]

This non-specific proffer does not meet the requirements of the rape shield statute. Dr. Momah points to no evidence in the record that before trial he made a specific, written offer of proof, supported by affidavit, explaining how the evidence would be relevant to show consent, rather than credibility. He cites no details about these alleged prior acts that would allow the trial court or this court to conclude that the prior acts are similar enough to this case to be relevant to the issue of consent. Thus, the trial court properly denied his request.

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[54] Report of Proceedings (Oct. 26, 2005) at 62.

[55] *Id.* at 63.

[56] *Id.*

Dr. Momah does not dispute that he failed to adhere to the procedural requirements of the rape shield statute. He argues, however, that the statute only applies to the types of prior sexual history listed therein and that H.P.'s alleged prior acts in this case do not fall within that list.

His argument is defied by the plain meaning of the statute, which applies to "Evidence of the victim's past sexual behavior ***including but not limited to***" the items in the list.[54] Because Dr. Momah offered evidence of H.P.'s "past sexual behavior," he was required to adhere to the statutory procedures. He failed to do so, and the trial court did not abuse its discretion in rejecting the evidence.

Dr. Momah also argues that the trial court violated his right to present a meaningful defense. But there is no constitutional right to present irrelevant evidence.[55] Evidence of a victim's prior sexual acts is irrelevant to the issue of credibility. It is only relevant to the issue of consent if there are similarities between past acts of consent and the defendant's allegations of consent in this case, making it more likely that the victim consented in this case.[56] Even if minimally relevant, such evidence

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[54] RCW 9A.44.020(2), (3) (emphasis added); *see also Gregory*, 158 Wn.2d at 783 (rejecting the appellant's argument that prior acts of prostitution are exempted from the statute).

[55] *Hudlow*, 99 Wn.2d at 15.

[56] *See id.* at 11.

must be excluded if it is substantially outweighed by its prejudicial effect.[60] The State has a compelling interest in preventing the admission of such evidence when it has a tendency to confuse the jury and interfere with the fact-finding process.[61] Here, Dr. Momah has not shown that the testimony is even minimally relevant, so his right to present a meaningful defense is not implicated.

SEVERANCE

Dr. Momah argues that the trial court abused its discretion in denying his motion to sever the four counts tried in this case. We disagree.

Criminal Rule 4.3(a) allows the State to join offenses in one charging document if the offenses:

> (1) Are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Criminal Rule 4.4 allows the trial court to sever joined offenses if doing so "will promote a fair determination of the defendant's guilt or innocence of each offense." A defendant seeking severance has the

[60] RCW 9A.44.020(3)(d).

[61] *Hudlow*, 99 Wn.2d at 18.

burden to show that joinder is so manifestly prejudicial that it outweighs the interest in judicial economy.[5]

We review a trial court's ruling on a motion to sever for an abuse of discretion.[6] We consider such factors as "the jury's ability to compartmentalize the evidence, the strength of the State's evidence on each count, the issue of cross admissibility of the various counts, [and] whether the judge instructed the jury to decide each count separately," and we weigh strongly the concern for judicial economy.[7] Jurors are presumed to follow the trial court's limiting instructions.[8]

Dr. Momah's argument rests largely on the assumption that he would succeed on the issue of exclusion of character evidence. But as discussed above, testimony about Dr. Momah's prior acts against each of the seven victims was properly admitted against Dr. Momah with regard to each of the four counts. Thus, because all of the testimony was cross-admissible as relevant to prove a common scheme or plan, there was no prejudice in allowing it to be presented in the same trial.

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[5] *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990).

[6] *Id.* at 717.

[7] *State v. Kalakosky*, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993).

[8] *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

Because of the strong concern for judicial economy and the jury's ability to follow instructions, a defendant seeking severance must make an even stronger showing of prejudice than required to admit ER 404(b) evidence.[9] Therefore, the fact that Dr. Momah could not meet this burden under ER 404(b) illustrates his inability to establish prejudice from joinder of the four counts against him.[10]

Finally, the trial court properly instructed the jury to consider each count separately. The court also instructed the jury that the ER 404(b) evidence should only be considered relevant to a possible common scheme or plan, and for no other purpose. Dr. Momah makes no argument that the jury was unable to follow these instructions.

ORDER IN LIMINE/MISTRIAL

Dr. Momah contends that two violations of an order in limine prejudiced his trial and that his mistrial motion should have been granted. We disagree.

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[9] *Bythrow*, 114 Wn.2d at 722.

[10] *See State v. Smith*, 74 Wn.2d 744, 756, 446 P.2d 571 (1968) ("However, since the evidence of the other crimes would have concededly been admissible in separate trials, the defendants were not unduly prejudiced by the joinder."), *vacated in part on other grounds by Smith v. Washington*, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972), *overruled in part on other grounds by State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975).

The purpose of a motion in limine is to prevent the jury from hearing potentially prejudicial matters.[68] A mistrial should only be granted based on a witness' violation of an order in limine if the defendant is so prejudiced by the violation that nothing short of a new trial would ensure that he receive a fair trial.[69] Jurors are presumed to follow the trial court's limiting instructions.[70] The decision to grant or deny a mistrial is within the sound discretion of the trial court and is reversible only for abuse of that discretion.[71] We should only overturn such a decision if there is a substantial likelihood that the evidence affected the jury's verdict.[72]

Here, the State made a motion in limine to include testimony from victim R.B. regarding traumatic events she had experienced during the period of time relevant to this case. The State wished to use these facts to explain minor inconsistencies, primarily regarding dates, between her trial testimony and prior statements, and Dr. Momah objected to admission of such testimony. The trial court concluded that, assuming Dr. Momah opened the door by pointing out

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[68] *State v. Austin*, 34 Wn. App. 625, 627-28, 662 P.2d 872 (1983), *aff'd*, *State v. Koloske*, 100 Wn.2d 889, 676 P.2d 456 (1984).

[69] *State v. Harris*, 48 Wn. App. 279, 284-85, 738 P.2d 1059 (1987).

[70] *Johnson*, 124 Wn.2d at 77.

[71] *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

[72] *Id.*

inconsistencies, the State could elicit that R.B. had an in-vitro fertilization procedure a couple days before one of the relevant interviews, and that her mother died about a month before another interview. She was not allowed to testify that one of her children later died, that her brother was terminally ill, or the specific circumstances surrounding her mother's death.

R.B. testified part of the day Wednesday and part of the day on Thursday. On Monday, she underwent cross-examination all morning. Just before the lunch hour, defense counsel cross-examined her regarding the order and dates of appointments she had attended, pointing out apparently inconsistent statements. She responded that it was difficult for her to remember exact dates of events that happened long ago, especially since she had other traumatic events in her life. Defense counsel continued as follows:

> Q. What's your birthday? What is your date of birth?
>
> A. December 30th.
>
> Q. What year?
>
> A. 1959. So you are telling me that I am supposed to remember the day and time I am sexually assaulted? I am supposed to remember that today on March 25th, Dr. Momah came and sexually assaulted me, and I am supposed to remember that, because this is the glorifying day that I need to remember? That is a glorifying time in my

> life? I can remember my daughter's birthday, because you know what, that is a glorifying time in my life. October 24th, 2004 my daughter was born. ***October 14th my son died***. . . .[73]

Defense counsel objected and moved for a mistrial. The trial court denied the motion for a mistrial, but after the lunch break issued a limiting instruction that R.B.'s son died through no fault of Dr. Momah, and the jury should disregard that fact.[74]

Later, on re-cross, defense counsel asked R.B. whether her mother dying led to incorrect statements in her subsequent interview. R.B. responded:

> There could be dates or times that maybe are not exactly right. I mean, just because my mother died on 7/31 of this year – My mother had a massive brain aneurysm at the same time I was being implanted with embryos.[75]

Defense counsel objected, and the court instructed the jury to disregard the statement.

We conclude that the trial court did not abuse its discretion in denying the motion for a mistrial. The circumstances regarding R.B.'s mother and son are entirely irrelevant to this case. True, her credibility in

---

[73] RP (Oct. 24, 2005) at 109 (emphasis added).

[74] *Id.* at 121.

[75] *Id.* at 136.

this case was important. But these events in her life were not so prejudicial that the trial court's instructions would have been ineffective. While the fact that her son died and her mother suffered a brain aneurysm may have garnered sympathy with the jury, they were irrelevant to whether she told the truth when she accused Dr. Momah of sexually abusing her.

ADDITIONAL EVIDENCE

Dr. Momah argues that alleged misconduct by a lawyer who represented witnesses in this case in separate civil litigation was prejudicial to his defense. He also claims the alleged misconduct by the civil attorney is chargeable to the State in this case. Because the record before us fails to substantiate this claim, we reject it.

Dr. Momah moved for an order requesting this court to take judicial notice of findings of fact and conclusions of law from a separate court proceeding. According to the motion, that proceeding addressed alleged misconduct of a civil attorney who is not employed by the State.

A commissioner of this court denied the motion, and a panel of this court denied Dr. Momah's motion to modify. The supreme court denied review of our ruling. Thus, the information Dr. Momah sought to bring before this court to support this appeal is not before us. We will therefore not review this claim on appeal.

¶40 We affirm the judgment and sentence.

APPELWICK, C.J., and GROSSE, J., concur.

Review granted at 163 Wn.2d 1012 (2008).

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, Vs. CHARLES MOMAH Defendant,	No. 04-1-05925-5 KNT **JUDGMENT AND SENTENCE FELONY** (Filed Feb. 7, 2008)

I. HEARING

1.1 The defendant, the defendant's lawyer, DAVID ALLEN, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: _____

II. FINDINGS

There being no reason why judgment should not be pronounced, the court **finds**:

2.1 **CURRENT OFFENSE(S)**: The defendant was found guilty on 11/16/2005 by jury verdict of:

Count No.:	I
Crime:	RAPE IN THE THIRD DEGREE
RCW:	9A.44.060(1)(a)
Crime Code:	00764
Date of Crime:	08/12/2003
Incident No.	

Count No.:	II
Crime:	INDECENT LIBERTIES
RCW:	9A.44.100(1)(d)
Crime Code:	00868
Date of Crime:	04/30/2002-06/01/2003
Incident No.	
Count No.:	III
Crime:	INDECENT LIBERTIES
RCW:	9A.44.100(1)(d)
Crime Code:	00868
Date of Crime:	04/30/2002-06/01/2003
Incident No.	
Count No.:	IV
Crime:	RAPE IN THE SECOND DEGREE
RCW:	9A.44.050
Crime Code:	00748
Date of Crime:	03/01/2003-04/01/2003
Incident No.	

[ ] Additional current offenses are attached in **Appendix A**

SPECIAL VERDICT or FINDING(S):

(a) [ ] While armed with a **firearm** in count(s) _____ RCW 9.94A.510(3).

(b) [ ] While armed with a **deadly weapon** other than a firearm in count(s) _____ RCW 9.94A.510(4).

(c) [ ] With a **sexual motivation** count(s) _____ RCW 9.94A.835.

(d) [ ] A V.U.C.S.A offense committed in **a protected zone** in count(s) _____ RCW 69.50.435.

(e) [ ] **Vehicular homicide** [ ] Violent traffic offense [ ] DUI [ ] Reckless [ ] Disregard.

(f) [ ] **Vehicular homicide** by DUI with _____ prior conviction(s) for offense(s) defined in RCW 41.61.5055, RCW 9.94A.510(7).

(g) [ ] **Non-parental kidnapping** or unlawful imprisonment with a minor victim, RCW 9A.44.130.

(h) [ ] **Domestic violence** offense as defined in RCW 10.99.020 for count(s) _____.

(i) [ ] Current offenses **encompassing the same criminal conduct** in this cause are count(s) _____ RCW 9.94A.589(1)(a).

2.2 OTHER CURRENT CONVICTION(S): Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

[ ] Criminal history is attached in **Appendix B**.

[ ] One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	9	V	60 MONTHS		60 MONTHS	5 YRS AND/OR $10,000
Count II	N/A	UNRNKD	0 TO 12		0 TO 12 MONTHS	10 YRS AND/OR $20,000
Count III	N/A	UNRNKD	0 TO 12		0 TO 12 MONTHS	10 YRS AND/OR $20,000
Count IV	9	XI	210 TO 280		210 TO 280 MONTHS	LIFE AND/OR $50,000

[ ] Additional current offense sentencing data is attached in **Appendix C**.

2.5 EXCEPTIONAL SENTENCE (RCW 9.94A.535):

[ ] Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) _____. Findings of Fact and Conclusions of Law are attached in **Appendix D**. The State [ ] did [ ] did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and **Appendix A**.

[ ] The Court DISMISSES Count(s) _____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

[ ] Defendant shall pay restitution to the Clerk of this Court as set forth in attached **Appendix E**.

[ ] Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(2), sets forth those circumstances in attached **Appendix E**.

[X] Restitution to be determined at future restitution hearing on (Date) _____ at _____m.

[X] Date to be set.

[ ] Defendant waives presence at future restitution hearing(s).

[ ] Restitution is not ordered.

Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of [$500].

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

(a) [ ] $_____, Court costs, [ ] Court costs are waived; (RCW 9.94A.030, 10.01.160)

(b) [ ] $100 DNA collection fee; [ ] DNA fee waived (RCW 43.43.754) (crimes committed after 7/1/02);

(c) [ ] $_____, Recoupment for attorney's fees to King County Public Defense Programs; [ ] Recoupment is waived (RCW 9.94A.030);

(d) [ ] $_____, Fine; [ ] $1,000, Fine for VUCSA; [ ] $2,000, Fine for subsequent VUCSA; [ ] VUCSA fine waived (RCW 69.50.430);

(e) [ ] $_____, King County Interlocal Drug Fund; [ ] Drug Fund payment is waived; (RCW 9.94A.030)

(f) [ ] $_____, State Crime Laboratory Fee; [ ] Laboratory fee waived (RCW 43.43.690);

(g) [ ] $_____, Incarceration costs; [ ] Incarceration costs waived (RCW 9.94A.760(2));

(h) [ ] $_____, Other costs for: _____

4.3 PAYMENT SCHEDULE: Defendant's **TOTAL FINANCIAL OBLIGATION** is: $ 500 + Restitution. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: [ ] Not less than $_____ per month; [X] On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. **The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied.** Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction maybe issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as

directed by DJA and provide financial information as requested.

[X] Court Clerk's trust fees are waived.
[X] Interest is waived except with respect to restitution.

4.4 The defendant, having been convicted of a ***FELONY SEX OFFENSE*** is sentenced to the following:

(a) **DETERMINATE SENTENCE:** Defendant is sentenced to a term of confinement in the custody of the [ ] King County ***Jail*** [ ] King County ***Work/Education Release*** (subject to conditions of conduct ordered this date) [X] ***Department of Corrections***, as follows, commencing: [X] immediately;

60 months/days on count I;
____ months/days on count ____;
____ months/days on count ____;
12 months/days on count II;
____ months/days on count ____;
____ months/days on count ____;
12 months/days on count III;
____ months/days on count ____;
____ months/days on count ____.

ALTERNATIVE CONVERSION – RCW 9.94A.680 (LESS THAN ONE YEAR ONLY):

_____ days of total confinement are hereby converted to:

[ ] ___ days of partial confinement to be served subject to the requirements of the King County Jail.

[ ] ___ days/hours community service under the supervision of the Department of Corrections to be completed as follows: [ ] on a schedule established by the defendant's Community Corrections Officer; [ ] _____

_____

[ ] Alternative conversion was not used because: [ ] Defendant's criminal history, [ ] Defendant's failure to appear, [ ] Other: _____

_____

[ ] **CONFINEMENT *LESS THAN ONE YEAR*: COMMUNITY [ ] SUPERVISION**, for crimes committed before 7-1-2000, [ ] **CUSTODY**, for crimes committed on or after 7-1-2000, is ordered pursuant to RCW 9.94A.545 for a period of 12 months. The defendant shall report to the Department of Corrections within 72 hours of this date or of his/her release if now in custody; shall comply with all the rules, regulations and conditions of the Department for supervision of offenders (RCW 9.94A.720); shall comply with all affirmative acts required to monitor compliance; and shall otherwise comply with terms set forth in this sentence.

[ ] **APPENDIX ___: Additional Conditions** are attached and incorporated herein.

[ ] **COMMUNITY PLACEMENT/CONFINEMENT OVER ONE YEAR**: pursuant to RCW 9.94A.700, for **qualifying crimes committed before 6-6-1996**, is ordered for _____ months or for the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer. [24 months for any serious violent offense,

vehicular homicide, vehicular assault, or sex offense prior to 6-6-96; 12 months for any assault 2°, assault of a child 2°, felony violation of RCW 69.50/52, any crime against person defined in RCW 9.94A.440 not otherwise described above.]

[ ] **APPENDIX H:** Community Placement conditions are attached and incorporated herein.

[ ] **COMMUNITY CUSTODY/CONFINEMENT OVER ONE YEAR:** pursuant to RCW 9.94A.710 for any **SEX OFFENSE committed after 6-6-96 but before 7-1-2000**, is ordered for a period of 36 months or for the period of earned early release awarded under RCW 9.94A.728 whichever is longer.

[X] **APPENDIX H: Community Custody conditions** are attached and incorporated herein.

COMMUNITY CUSTODY/CONFINEMENT OVER ONE YEAR: pursuant to RCW 9.94A.715 **for qualifying crimes (non RCW 9.94A.712 offenses) committed after 6-30-2000** is ordered for the following established range:

[X] Sex Offense, RCW 9.94A.030(38) – 36 to 48 months

[ ] Serious Violent Offense, RCW 9.94A.030(37) – 24 to 48 months

[ ] Violent Offense, RCW 9.94A.030(45) – 18 to 36 months

[ ] Crime Against Person, RCW 9.94A.411 – 9 to 18 months

[ ] Felony Violation of RCW 69.50/52 – 9 to 12 months

or for the entire period of earned early release awarded under RCW 9.94A.728, whichever is longer. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant to RCW 9.94A.737.

[X] **APPENDIX H: Community Custody conditions** are attached and incorporated herein.

(b) **INDETERMINATE SENTENCE – QUALIFYING SEX OFFENSES occurring after 91/01:**

The Court having found that the defendant is subject to sentencing under RCW 9.94A.712, the defendant is sentenced to a term of total confinement in the custody of the **Department of Corrections** as follows, commencing: [X] immediately; [ ] (Date): _____ by _____.m.

Count IV : **Minimum Term:** 245 months/days;
Maximum Term: Life ~~years~~/life;
Count ____: **Minimum Term:** ___ months/days;
Maximum Term: ____ years/life;
Count ____: **Minimum Term:** ___ months/days;
Maximum Term: ____ years/life;
Count ____: **Minimum Term:** ___ months/days;
Maximum Term: ____ years/life.

[X] **COMMUNITY CUSTODY** – pursuant to RCW 9.94A.712 **for qualifying SEX OFFENSES committed on or after September 1, 2001**, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence as set forth above. Sanctions and punishments for non-compliance will be imposed by the Department

of Corrections pursuant to RCW 9.94A.713, 9.94A.737.

[X] **APPENDIX H: Community Custody conditions** are attached and incorporated herein.

4.5 ADDITIONAL CONDITIONS OF SENTENCE

The above terms for counts I-IV are consecutive/ concurrent

The above terms shall run [ ] CONSECUTIVE [ ] CONCURRENT to cause No.(s) _____

_____

The above terms shall run [ ] CONSECUTIVE [ ] CONCURRENT to any previously imposed sentence not referred to in this order.

[ ] In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special **WEAPON** finding(s) in section 2.1: _____

_____

which term(s) shall run *consecutive* with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98.)

[ ] The enhancement term(s) for any special **WEAPON** findings in section 2.1 is/are *included* within the term(s) imposed above. (Use this section when appropriate, but for *crimes before 6-11-98* only, per *In Re Charles*)

The **TOTAL** of all terms imposed in this cause is 245 months.

Credit is given for [X] 85 days served [ ] days as determined by the King County Jail, solely for confinement under this cause number pursuant to RCW 9.94A505(6). [ ] Jail term is satisfied – defendant shall be released under this cause.

4.4 4.6 NO CONTACT: For the maximum term of Life years, defendant shall have no contact, direct or indirect, in person, in writing, by telephone, or through third parties with: H.P., S.S., R.B., C.B., C.R., S.W., K.T.

[ ] Any minors without supervision of a responsible adult who has knowledge of this conviction.

4.7 DNA TESTING: The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in **APPENDIX G**.

[X] **HIV TESTING:** For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in **APPENDIX G**.

4.8 SEX OFFENDER REGISTRATION:

The defendant shall register as a sex offender as ordered in **APPENDIX J**.

4.9 ARMED CRIME COMPLIANCE, RCW 9.94A.475, .480. The State's plea/sentencing agreement is [ ] attached [ ] as follows:

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: 2/6/06 /s/ [Illegible]
JUDGE
Print Name: Judge M. Trickey

Presented by:	Approved as to form:
/s/ R. Rogoff	/s/ D. Allen
Deputy Prosecuting Attorney, WSBA# 23362	Attorney for Defendant, WSBA#
Print Name: R. Rogoff	Print Name David Allen

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHARLES MOMAH, Petitioner.	**ORDER DENYING MOTION FOR RECONSIDERATION** NO. 81096-6 C/A No. 58004-3-I King County No. 04-1-05925-5 KNT

The Court having considered the Motion for Reconsideration, the Response to Motion to Reconsider and Reply Re: Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That Petitioner's Motion for Reconsideration is denied.

DATED at Olympia, Washington this 10th day of March, 2010.

For the Court:

/s/ [Illegible]
for CHIEF JUSTICE

167 Wn.2d 140

No. 09-1500

Supreme Court, U.S.
FILED
APR 27 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CHARLES MADU MOMAH,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant who, for tactical reasons, invites a state trial court to conduct *voir dire* of certain jurors outside the public courtroom should be foreclosed from asking on appeal that his conviction be reversed because the trial court accepted the invitation to effectively close the courtroom?

2. Whether the state supreme court properly found that a *de facto* courtroom closure was not structural error where the closure was advocated by the defendant and adopted by the state trial court because it protected the defendant's interests, allowed more effective *voir dire*, and ensured that a fair and impartial jury was selected.

LIST OF PARTIES

Petitioner:

Charles Madu Momah

Respondent:

The State of Washington

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OPINIONS BELOW

The opinion of the Washington Supreme Court is attached to Momah's petition for writ of certiorari. Pet. App. at 1-32. The opinion of the Washington Court of Appeals is also attached to Momah's petition. Pet. App. at 34-68.

JURISDICTION

Jurisdiction is asserted by Petitioner pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The facts of Momah's crimes are adequately set forth in the opinion of the Washington Court of Appeals. Pet. App. at 34-36. Momah was charged with the crimes of Rape in the Third Degree in Count I, Indecent Liberties in Count II, Indecent Liberties in Count III, and Rape in the Second Degree in Count IV. No appellate court has questioned the jury's finding that Momah was guilty of multiple counts of sexual assault of women whom he treated as a physician.

A. Facts Relevant to Jury Selection

Preparing for and conducting *voir dire* in Momah's trial spanned five court days, as follows: Thursday, October 6 (discussion of jury logistics);

Monday, October 10 (questioning of entire panel for "hardship" exemptions to service); Tuesday, October 11 (questioning of a select group of jurors in chambers); Wednesday, October 12 (*voir dire* of entire *venire*); Thursday, October 13 (finished *voir dire*). Each day except Tuesday, October 11, *voir dire* was conducted in open court. A more detailed account is provided below.

On the second day of trial, Thursday, October 6, 2005, during pretrial motions, defense counsel signaled that he desired juror confidentiality. Counsel presented a proposed confidential jury questionnaire that was ultimately adopted by the court. *See* 10/6/05 TR:67; 10/10/05 TR:5. Defense counsel at one point encouraged the court to *seal* the questionnaires, saying, " . . . I would think that there would be exceptions to releasing those, given privacy. I know that courts oftentimes keep juror information confidential." 10/6/05 TR:75.

That same day, in response to the court's inquiry about press coverage, defense counsel objected to television coverage of *voir dire*. 10/6/05 TR:93 ("I would very much object to jury selection being televised"). The prosecutor replied that under case law and court rules, jury selection was open to the public. 10/6/05 TR:93-94 (prosecutor specifically citing *State v. Brightman*, 122 P.3d 150 (Wash. 2005) and Wash. General Rule 16). The court added that "the presumption is all proceedings are open." 10/6/05 TR:94. Ultimately, the television station did not request permission to cover *voir dire*.

More than 100 jurors were randomly selected for the *venire*. Jury selection was conducted in the presiding courtroom, the only room in the King County Courthouse large enough to accommodate the large *venire*.

Also on Thursday, October 6, several days before active questioning of potential jurors, there was discussion among all counsel and the court about how to accomplish *voir dire* with such a large number of prospective jurors. 10/6/05 TR:80-86.[1] After weighing options, the court decided that the best approach would be to leave the large group of jurors in the courtroom and to question jurors individually in chambers behind the courtroom. 10/6/05 TR:81-82. Likely because it was consistent with his overall approach to *voir dire*, defense counsel did not object to the court's decision.

The following court day, Monday, October 10, was devoted to administration of the confidential questionnaire and to vetting hardship challenges. 10/10/05 TR:10-18 (questionnaires), 78-156 (hardships). Although in-chambers questioning was discussed again, defense counsel said nothing to discourage this approach. 10/10/05 TR:4-7.

[1] Momah erroneously claims that questioning of jurors in a closed room was discussed "for the first time" on October 11. Pet. at 7. As indicated here, the parties discussed conducting *voir dire* in chambers five days before October 11.

On Tuesday, October 11, the parties reconvened in the presiding courtroom. 10/11/05 TR:1. The court noted that eight jurors had asked in their questionnaires for private questioning and eight more jurors indicated they could not be fair. 10/11/05 TR:2-3. A list of jurors to be individually questioned was discussed at great length. 10/11/05 TR:5-8, 17-20. The 36 jurors in this group identified for individual questioning had either asked for private questioning or could not be fair for some reason. 10/11/05 TR:3-5, 7-8, 27. Defense counsel said, "I would agree with the prosecutor's list." 10/11/05 TR:6.

Defense counsel was also twice asked to comment on the proposed procedure of individual questioning of this group. 10/11/05 TR:4, 8. First, he asked to expand the private questioning to include jurors who expressed an inability to be fair or who had prior knowledge of the case. *Id.* ("It is our position and hope that the court will take *everybody* individually.") (italics added). The court then re-confirmed its earlier-stated plan to question jurors in chambers and added that for-cause challenges would be taken in open court, rather than in chambers. Defense counsel replied that his "only question" had to do with the manner of taking for-cause challenges. 10/11/05 TR:8. Ultimately, the parties and the court agreed that 20 jurors were to be questioned in the morning and 11 were to be questioned in the afternoon. 10/11/05 TR:17-19. Once in-chambers questioning began, the record shows that the court and defense counsel actively questioned 13 jurors before lunch

in chambers and four jurors in a jury room in the afternoon, outside the actual courtroom. 10/11/05 TR:19-104, 106-142.

On Wednesday, October 12, the overall number of *venire* members had dwindled so individual questioning of six jurors occurred in the open public courtroom, not the jury room. 10/12/05 TR:11-12. After lunch, the court noted that 15 jurors wanted individual questioning or said they could not be fair. 10/12/05 TR:75-77. This questioning was to occur in open court, but defense counsel suggested that one juror be questioned privately, not publicly, even though the juror did not request private questioning.

> MR. ALLEN: There is one more we should, just in an ounce of precaution, take *privately*, 141, who on page 1 says that he was molested – he or she was molested as a child. There is no request that this be done *privately*. But I am concerned about asking those questions *publicly*.

10/12/05 TR:77 (italics added). The court denied the request. *Id.*

The rest of *voir dire* and the trial were conducted in open court and Momah was convicted as charged. On February 6, 2006, the court imposed judgment and sentence. Pet. App. 69-82.

B. Appellate Decisions

Momah appealed and argued that the trial court violated his right to a public trial when it conducted a portion of *voir dire* outside the courtroom. He made no claim under the First Amendment. The Court of Appeals rejected his argument, holding that Momah had failed to establish that the trial court closed proceedings, because the trial court did not order closure and nobody was *de facto* prevented from attending *voir dire*. *State v. Momah*, 171 P.3d 1064 (Wash. App. 2007).

The Washington Supreme Court granted review of the Court of Appeals decision and considered the case together with a similar case, *State v. Strode*, 217 P.3d 310 (Wash. 2009). Oral argument was heard on the same day and decisions were filed in each case on the same day. The *Strode* decision cross-references *Momah* in detailed respects.[2]

In *Momah*, the Washington Supreme Court focused extensively on the degree to which defense counsel had made a deliberate choice to conduct private questioning. It found:

> Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from

---

[2] Momah has not cited or discussed the *Strode* case in his petition for certiorari.

> the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests.

Pet. App. at 11. In essence, the court determined that it was clear – from Momah's strategic positions at trial and the court's inquiry and rulings – that the constitutionally required inquiry was satisfied, although a more express application of the relevant factors was recommended. Pet. App. at 16, n.2. The state supreme court also found that:

> From the outset of trial, we presume Momah made tactical choices to achieve what he perceived as the fairest result. Before in-chambers *voir dire* began, defense counsel, the prosecution, and the judge discussed numerous proposals concerning the juror selection. . . . Although Momah was provided the opportunity to object to the in-chambers proposal, he never objected. Further, he gave no indication that a closed *voir dire* might violate his right to public trial. To the contrary, defense counsel made a deliberate choice to pursue in-chambers *voir dire* to avoid "contamination" of the jury pool by jurors with prior knowledge of Momah's case. Defense counsel affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning. As a result of this closure and defense counsel's active

> participation in the questioning, Momah was able to exercise numerous challenges for cause, removing biased and partial jurors from the *venire*. We find all of these actions by Momah's counsel and the trial judge occurred in order to promote and safeguard the right to an impartial jury.

Pet. App. at 16. Based on the entire record, including defense counsel's desire for closure and the trial court's inquiry into closure and the basis for its rulings, the state supreme court found that structural error had not occurred:

> As we stated above, courts grant automatic reversal and remand for a new trial only when errors are structural in nature. An error is structural when it necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. In each case, the remedy must be appropriate to the violation.
>
> We hold the closure in this case was not a structural error. The closure occurred to protect Momah's rights and did not actually prejudice him. The record reveals that due to the publicity of Momah's case, the defense and the trial court had legitimate concerns about biased jurors or those with prior knowledge of Momah's case. The record also demonstrates that the trial court recognized the competing article I, section 22 [of the Washington Constitution] interests in this case. The court, in consultation with the

> defense and the prosecution, carefully considered the defendant's rights and closed a portion of voir dire to safeguard the accused's right to an impartial jury. Further, the closure was narrowly tailored to accommodate only those jurors who had indicated that they may have a problem being fair or impartial. Momah affirmatively accepted the closure, argued for the expansion of it, actively participated in it, and sought benefit from it. Thus, the underlying facts and impact of the closure in Momah are significantly different from those presented by our previous cases. Reversal of Momah's conviction and remand of his case cannot be the remedy under these circumstances. We affirm the jury's determination of guilt.

Pet. App. at 16-17.

Significantly, in *Strode*, the companion case before the Washington Supreme Court, the state supreme court determined that because Strode had not invited closure, because the trial court made no meaningful inquiry into the reasons for closure, and because there was no record on which to assess the propriety of closure, private inquiry of jurors was structural error that required automatic reversal. *Strode*, 217 P.3d at 313-16. Two concurring justices explained in great detail the differences between the cases, in particular that Momah had invited closure whereas Strode had simply failed to object to closure. *Id.* at 318-19 (Fairhurst, J., concurring).

Momah sought reconsideration of the state supreme court decision on two factual questions: (1) that the record did not support the court's findings of invited error, and (2) that the record did not support the court's finding that Momah benefited from private inquiry of jurors. Momah also sought reconsideration claiming that structural error occurred and is *per se* reversible. The motion for reconsideration was denied.

REASONS THE PETITION SHOULD BE DENIED

Momah asks this Court to grant certiorari and reverse his convictions because the state trial court questioned some jurors behind closed doors about sensitive topics in a sexual abuse trial. Momah fails to acknowledge, however, that he did not simply fail to object to the questioning of these jurors. Rather, Momah urged the trial court to implement the very method of *voir dire* that the court employed, and he vigorously pursued questioning of jurors in chambers in an effort to seat a jury that would fairly decide his case. The Washington Supreme Court properly applied the invited error doctrine and refused to grant him a new trial under these circumstances, observing that he had clearly assented to the court's procedure in an effort to secure his right to a fair trial. Moreover, the court found that the trial court's pre-closure inquiry was sufficient, especially in light of counsel's

tactical pursuit of private *voir dire*, so there was no structural error.

The State of Washington respectfully asks this Court to deny certiorari because Momah plainly invited the error he asserts in his petition. This Court would not even consider a claim like the petitioner's – invited and used for his own gain at trial – in a federal appeal. Further, there is no controversy among the appellate courts on this issue. There is simply no room on this Court's crowded docket to review invited error.

Moreover, Momah's claim that the Washington Supreme Court misunderstood the doctrine of structural error is belied by the holding in *Momah* itself and by the holding in *State v. Strode*, the companion case argued and decided with Momah's case. Although Momah fails to even mention *Strode* in his petition for certiorari, the Washington Supreme Court held that a similar closed *voir dire* proceeding was structural error that required automatic reversal for retrial. Thus, contrary to Momah's contention, the Washington Supreme Court has not adopted a rule that structural errors can be harmless; the court simply found no structural error under the circumstances. Moreover, no other appellate court – state or federal – has committed the error that Momah alleges the Washington Supreme Court committed. Certiorari is simply not warranted.

A. MOMAH'S CONVICTIONS WERE AFFIRMED BECAUSE HE INVITED ERROR; THERE IS NO SPLIT OF AUTHORITY ON WHETHER AN INVITED ERROR SHOULD BE REVIEWED ON APPEAL.

Momah mischaracterizes the state supreme court's decision as a case of "failure to object" or "silence" in the face of a courtroom closure, and then announces that there is a split between federal appellate circuits and state supreme courts on whether a closed courtroom claim can be raised for the first time on appeal absent a contemporaneous trial objection. Pet. at 19. But Momah misrepresents the factual conclusion of the Washington Supreme Court, and he ignores an important companion case. His arguments for certiorari on the issue of mere "silence" are simply inapposite. Momah's conviction was affirmed because he invited questioning of jurors behind closed doors, not because he simply failed to object to such questioning. This point is illustrated by the express language of the *Momah* decision set forth above. Pet. App. at 11, 16-17.

This point is also starkly apparent when *Momah* is contrasted with *State v. Strode*, the companion case argued and decided together with *Momah*. In *Strode*, the court held that review and reversal was appropriate because Strode's courtroom was closed. The court noted reversal was appropriate even though counsel had not made a contemporaneous trial objection.

Strode, 217 P.3d at 313-16. The concurring opinion fully explained, however, that the court reached different results in *Strode* and *Momah* because Momah invited error, whereas Strode simply failed to object. *Id.* at 318-19 (Fairhurst, J., concurring).

The record fully supports these findings. Momah proposed a confidential jury questionnaire, he asked that the questionnaire be sealed, he opposed televising *voir dire*, he agreed when the court decided to question a small group of jurors in a jury room adjacent to the courtroom, he argued that the group questioned privately should be larger, and he actively participated in this private questioning process. Even after the *venire* was reduced in size and questioning was being conducted in open court, Momah asked the court to return to private, not public, questioning of an additional juror who had not even requested privacy. There is no question that Momah encouraged and fully participated in the private questioning that he now challenges.

This contrast between *Momah* and *Strode* was readily apparent to Momah in the Washington State Supreme Court. In fact, he argued strenuously in a motion for reconsideration to the state supreme court that there was no factual basis for concluding he had invited error, but he certainly recognized that the Washington Supreme Court had *found* such a difference. Momah argued:

> There is no principled distinction between *Strode* and *Momah*. . . . This Court, however,

> stated that there was one big one: Dr. Momah's affirmative request for courtroom closure and the judge's decision to grant it to avoid jury contamination due to the enormous amount of publicity surrounding the case: "Momah affirmatively assented to the closure, (and) argued for its expansion." *State v. Momah*, 2009 Wash. LEXIS 967 at *12. "(D)efense counsel made a deliberate choice to pursue in-chambers *voir dire* to avoid 'contamination' of the jury pool by jurors with prior knowledge of Momah's case." Id., 2009 Wash. LEXIS 967 at *19. "Defense counsel affirmatively assented to . . . and even argued for the expansion of in-chambers questioning." Id., 2009 Wash. LEXIS 967 at *2. . . . The record flatly contradicts these assertions.

Motion to Reconsider at 2-3. Thus, Momah recognized in state court that the Washington Supreme Court's decision did not rest on the simple failure to object. In his petition for certiorari he simply ignores this distinction – and fails to cite the *Strode* decision at all.

These shortcomings should be fatal to his petition. This Court has consistently held that constitutional rights are not self-executing. *Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal . . . cases by the failure to make timely assertion of the right"). Even structural errors can be forfeited.

Freytag v. Comm'r, 501 U.S. 868, 896 (1991) (". . . if the litigant does not assert [it] in a timely fashion, he is foreclosed.") (Scalia, J., concurring). *See also Peretz v. United States*, 501 U.S. 923, 936 (1991) ("[t]he most basic rights of criminal defendants are . . . subject to waiver."). This Court has applied this principle to open courtroom claims under the Sixth Amendment. *Levine v. United States*, 362 U.S. 610, 619 (1960); *Waller v. Georgia*, 467 U.S. 39, 42 n.2 (1984). This Court has also held that First Amendment claims may be forfeited. *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 432-33 n.12 (1963). The rationale for rules of forfeiture is well-known:

> If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed. There is good reason for this; "anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal." *United States v. Padilla*, 415 F.3d 211, 224 (C.A.1 2005) (en banc) (Boudin, C. J., concurring).
>
> This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute. In the case of an actual or

> invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from "'sandbagging'" the court -- remaining silent about his objection and belatedly raising the error only if the *case does not conclude in his favor. Cf. Wainwright v. Sykes*, 433 U.S. 72, 89 (1977); *see also United States v. Vonn*, 535 U.S. 55, 72 (2002).

Puckett v. U.S., 129 S.Ct. 1423, 1428-29 (2009).

Although there may be some question as to whether structural errors automatically satisfy the third prong of the plain-error test, *Puckett v. U.S.*, 129 S.Ct. at 1432, the plain-error test stems from a federal rule of procedure that applies only in federal courts, and only where a defendant has been silent in the federal trial court. Here, Momah invited error as opposed to simply letting it occur, and this Court has *never* suggested that an invited error may be raised for the first time on appeal. There is no split of authority on this question.

Finally, it is questionable whether this court has jurisdiction because the Washington Supreme Court's decision rests on adequate and independent state grounds. *See* E. Gressman, K. Geller, S. Shapiro, T. Bishop & E. Hartnett, *Supreme Court Practice*, ch. 3.26, p. 222 (9th ed.2007).

This Court has held that preservation of error is a matter of state law, not federal law.

Waller v. Georgia, 467 U.S. at 42 n.2.[3] Washington has an unusually liberal rule allowing consideration of constitutional issues raised for the first time on appeal. *See* RAP 2.5(a). But even that rule is limited by invited error. Whether the unusual facts of this case constitute "invited error" is an issue of State law, not Federal law.

Moreover, the underlying analysis of the Washington Supreme Court was closely tied to uniquely state constitutional issues.

> This case asks us to determine whether a defendant's constitutional right to a public trial under article I, section 22 was violated when the court closed a portion of voir dire to safeguard the defendant's right to a trial by an impartial jury. While our previous article I, section 22 cases have focused on the defendant's right to a public trial, this case implicates both the right to a public trial and the right to an impartial jury. Here, we find the trial court, in consultation with the defense and the prosecution, carefully considered the

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[3] Momah claims that in *Waller*, this Court applied a rule of automatic reversal even as to claims not raised in the trial court because this Court "granted relief" to all Petitioners. Pet. at 20 (citing *Waller*, 467 U.S. at 42, n.2). But footnote 2 makes clear that Petitioners Waller, Thompson, Eula Burke and W.B. Burke were entitled to relief, i.e., a new suppression hearing because the first suppression hearing was closed over their objection. Petitioner Cole could be procedurally barred under Georgia law because he had asked for a closed hearing. Thus, footnote 2 undercuts rather than supports Momah's claim.

> defendant's article I, section 22 rights, closed the courtroom to preserve his right to an impartial jury, and narrowly tailored the closure to secure that right. We hold that the closure was not a structural error and affirm Charles Momah's conviction.

Pet. App. at 2.

Both the procedural bars and state constitutional aspects of the Washington Supreme Court's decision illustrate that it rests on adequate and independent state grounds. This Court does not have jurisdiction to consider Momah's case.

For these reasons, Momah's petition for certiorari on the question of preservation of error should be rejected.

B. THE WASHINGTON SUPREME COURT FOUND NO STRUCTURAL ERROR; IT DID NOT FIND THAT STRUCTURAL ERROR WAS HARMLESS, AS MOMAH CLAIMS.

Momah misconstrues the Washington Supreme Court's decision as to structural error. The court held that the trial court effectively conducted the requisite inquiry before questioning jurors in private and that no structural error occurred. Pet. App. at 11, 17. That holding is supported by the record, insofar as the state supreme court found that the trial court's reasons for closure were clear – to secure the defendant a fair trial in the least restrictive manner possible – and especially in light of defense counsel's

tactical maneuvering that assured private inquiry of the jurors.[4]

Moreover, in the companion case of *State v. Strode*, the Washington Supreme Court clearly articulated and applied the usual rule: that absent a procedural bar to review, error in closing a courtroom is structural and mandates reversal of the conviction. *Strode*, 217 P.3d at 313-16. Momah does not cite to even one decision from any other appellate jurisdiction where a court has held that structural error may be harmless. There is simply no split of authority on this question, and the Washington Supreme Court properly understood and applied the law on this issue. A decision by this Court in this case will not assist other appellate courts because the decision here is wholly driven by the unique facts of the case.

CONCLUSION

Momah ignores the fact that the Washington State Supreme Court denied relief to Momah largely because he invited, acquiesced in, and benefited from

[4] The Washington Supreme Court's decision comports with this Court's recent decision in *Presley v. Georgia*, ___ U.S. ___, 130 S.Ct. 721 (2010), in which the Court stated: "While the accused does have a right to insist that the *voir dire* of the jurors be public, there are exceptions to this general rule. '[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial . . .'" *Presley*, 130 S.Ct. at 724 (quoting *Waller*, 467 U.S. at 45).

an erroneous procedure that he now says requires an automatic new trial. No court should countenance the pernicious practice of encouraging a trial court to adopt a procedure and then claiming on appeal that the procedure is reversible constitutional error. Moreover, the Washington Supreme Court did not find structural error because the record was sufficient to conclude that closure was warranted, especially in light of defense counsel's deliberate tactic to attempt to secure closure. The Washington Supreme Court is not confused as to whether structural error must result in automatic reversal based on a preserved error. Certiorari should be denied.

Respectfully submitted,

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